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An Assessment of the Impact of Economic Partnership Agreements (EPAs) on the SADC Regional Integration Process

Elijah Munyuki

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List of Acronyms

ACP	Africa, Caribbean and Pacific
CEMAC	Economic Community of Central African States
CET	Common External Tariff
COMESA	Common Market for East and Southern Africa
DFQ	Duty free and Quota Free
EPAs	Economic Partnership Agreements
ESA	East and Southern Africa (ESA)
EAC	East African Community (EAC)
EU	European Union (EU)
HS	Harmonised Commodity Description and Coding System (HS)
IEPA	Interim Economic Partnership Agreements
MFN	Most favoured Nation Treatment
FIP	Protocol on Finance and Investment
FTA	Free Trade Area
GATS	General Agreement on Trade in services
NTBs	Non-Tariff Barriers
RECs	Regional Economic Communities
RISDP	Regional Indicative Strategic Development Plan
RoO	Rules of Origin
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordinating Conference
SPS	Sanitary and Phytosanitary measures
TBTs	Technical barriers to trade
TDCA	Trade and Development Cooperation Agreement
WTO	World Trade Organisation

Executive Summary

1. Introduction

The Southern African Development Community (SADC) dates back from the formation in 1975 of the Frontline States which originally consisted of Botswana, Mozambique and Tanzania, Angola joined in 1976. The Frontline States were constituted to fight against colonialism, racism and white minority rule. The group changed into the Southern African Development Coordinating Conference (SADCC) in 1980 following the July 1979 Arusha Conference which agreed to launch the SADCC. The SADCC was launched on the Lusaka Declaration (April 1980) which adopted a programme of action to reduce economic dependence on South Africa; to forge links to create equitable regional integration; and to mobilise resources for implementing national and interstate policies. In 1992 the SADCC was transformed into the Southern African Development Community (SADC) by the signing of a treaty which defined the SADC membership's binding commitments.

The transformation of SADCC into SADC was premised on the desire of the Southern African leadership to focus more on deepening economic cooperation and integration and on tackling the barriers to economic development in the region. As members of the Africa, Caribbean and Pacific (ACP) Group the SADC countries also benefitted from the one-way trade preferences offered by the European Union (EU) to its membership's former colonies.

2. The Economic Partnership Agreements

The Cotonou Agreement signed in 2000 between the members of the European Union (EU) and the Africa, Caribbean and Pacific (ACP) Group of States provided for the continuation of the non-reciprocal preferences accorded under the Fourth (Lomé) ACP-EC Convention as a transitory trade arrangement up to 1 January 2008. During the period September 2002 – December 2007, the EU and the ACP States were expected to negotiate new WTO compatible trade regimes (Economic Partnership Agreements) providing for the progressive removal of barriers to trade between them and enhancing cooperation in all areas relevant to trade. According to Article 37 (5) of the Cotonou Agreement, these EPA negotiations will be undertaken with ACP Countries which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group, taking into account regional integration processes within the ACP.

The EPAs were to be negotiated in two phases. The first phase, which was at an all ACP EU level and to address crosscutting issues of interest to all parties. The second phase was to be conducted at regional level, to address region specific issues. In preparation for the negotiations with the EU at the regional level, the ACP States configured themselves into six (6) ACP negotiating regions as follows: Cariforum (Caribbean

States), West Africa, East and Southern Africa (ESA), Central Africa (CEMAC), Southern Africa (SADC EPA) and the Pacific Forum (Pacific States). By the end of 2007, the EAC EPA configuration had been created, consolidating the Member States of the EAC Customs Union.

In the case of Africa, however, the EPA negotiating configurations in some instances do not have corresponding membership to the existing regional economic integration organizations. For instance, the Southern African Development Community (SADC), which is composed of 15 Member States, has its members currently negotiating in four (4) different EPA configurations.

3. Objectives of this study

The study informs SADC region on the strategies and options that should be considered in order to ensure that the EPA reinforces the regional integration process rather than disrupt it. The study:

(i) Carried out a detailed assessment of the impact of the EPAs concluded and/or expected to be concluded by the SADC Member States on the wider SADC regional integration process; and

(ii) Made specific recommendations on how the SADC region can ensure that the EPAs do not undermine their regional integration process but rather reinforce it.

4. Study findings

4.1 The SADC regional integration agenda

Before tackling relations with third parties, in this case, the EU under the EPAs process it is important that the SADC countries have a clear direction on their own regional integration efforts. Although a number of instruments have been signed by the SADC membership for the purposes of deepening regional integration there are considerable difficulties in the implementation of these instruments. These problems go to the core of the common market agenda and reflect competing priorities and obligations. Whilst some targets have been met with respect to the integration process a number of critical areas indentified for implementation under the Protocol on Trade, Protocol on Finance and Investment (PFI), the Regional Indicative Strategic Development Programme (RISDP) and the Protocol on the Facilitation of the Movement of Persons remain unfulfilled. The enforcement of some aspects of the PFI is difficult since there are no proper implementation modalities based on clear legal obligations, this is made worse by the absence of key timeframes for the achievement of the milestones. There is also a clear absence of political will to implement the provisions of the proposed regime for the movement of natural persons, this is regrettable given the direct linkages between this regime and the trade and investment instruments adopted by the SADC countries. The proposed regime for the movement of persons contains provisions on

the right of establishment which is absent from the PFI, such a right enhances the investment climate and reassures potential investors from the region. The absence of political will to enhance the implementation of these regional integration programmes is also compounded by the in-built inconsistencies in the regional instruments themselves.

4.1.1 Intra-SADC trade

The non-implementation of regional agreements and supply side constraints limit the opportunities for the small economies of the SADC countries to participate in a strongly integrated region. The huge presence of NTBs increases the costs and risk of doing business as well as undermining the competitiveness of firms, both of which slow intra-regional trade and development. In many instances, these have prohibited small firms' access to regional markets. In addition to NTBs, some countries in the region are battling to formulate industrial support policies aimed at providing incentives for productivity enhancement, industrial development, investment and trade expansion. This background creates low levels of intra-regional trade.

4.2 Regional integration and the EPAs process

Consideration of the actual content of the 4 IEPAs shows significant areas of divergences, this when taken into account with the relevant provisions under the TDCA shows very little substantive convergences with respect to the SADC countries' positions in the trade relations with the EU. The differences are not limited to a lack of a regionally coherent SADC-EU trade policy but they go to the core of the SADC regional integration process itself. In other words the substantive aspect of the IEPAs will further widen the gaps already inherent in the SADC regional integration process. In some instances mentioned above, some of the IEPA provisions actually contradict existing provisions in the SADC Protocol on Trade. In some instances the IEPAs expose the inconsistencies between SADC regional integration instruments, such as the tensions between the RISDP and the PFI with respect to the liberalisation of the movement of capital.

The biggest obstacle thrown by the IEPAs is the complete marginalisation of the existing RECs, and particularly the Secretariats of these RECs, in this context SADC comes out the worst affected institution.

The SADC IEPA was initialled in December 2008 by Botswana, Lesotho, Swaziland and Mozambique. Angola and South Africa did not initial the agreement whilst Namibia initialled the agreement with reservations. Whilst the SADC IEPA contains a commitment to negotiate trade related issues, South Africa is opposed to negotiations on these new generation issues noting that the Cotonou Agreement contains no such obligation. In addition another SADC country, the DRC is also not participating in negotiations on these issues as the Central Africa IEPA is yet to include all the members of the

configuration apart from Cameroon which is the only signatory to date, and which has not even started to implement the IEPA. Consequently there is no coherent regional position even on the second phase of the negotiations which are being conducted in order to achieve the full EPAs.

In-built tensions in the SADC integration agenda and the EPA process have left the SADC regional integration agenda in a precarious position that requires immediate corrective action if the common market vision of the SADC is to be achieved.

5. Recommendations

The most immediate problem is for the SADC membership to resolve "self-inflicted" implementation difficulties around the SADC regional integration process. The study identified a number of issues around the trade policy instruments adopted at regional level where no progress has been forthcoming in terms of implementation for the enhancement or achievement of stated regional goals.

The second stage towards enhancing regional integration should involve a SADC wide review of the regional integration process in the context of the EPAs, in particular in the light of the substance and speed of the second stage of the negotiations. The deadlines set for the achievement of agreements in the second stage of the negotiations have already been missed, and in some regions notably the Central Africa EPA group, they have not even started. There is no harm is SADC states deliberately delaying this process for the purpose of aligning the regional positions, which are yet to be developed, with the aims of the second stage of the negotiations, especially on the divisive new generation issues.

The following issues are pertinent in order to gain some level of regional coherence in the EPA process-

- Rationalising the liberalisation commitments made with respect to trade in goods, in particular taking account of the potential effects of the differences in the liberalisation schedules under the ESA and SADC EPAs.

- Re-examining the MFN clauses to eliminate incoherencies with respect to obligations of SADC countries in FTAs with Parties other than the EU.

- Establishing certainty on the dispute settlement mechanism on trade defense instruments, in particular, anti-dumping and countervailing measures.

- Creating convergence on the application periods for safeguard measures in order to take account of the positions of Tanzania and the DRC. Further it is necessary to align this process with the treatment of safeguard measures under the TDCA, in particular article 25 thereof which has an

effect on the proposed infant industry protection clauses suggested by, for example, the SADC EPA group.

- Resolving differences on the treatment of quantitative restrictions, in particular, the fact that the Central Africa IEPA may result in the DRC adopting positions which are different from the SADC Protocol.

- Harmonising positions on the use of fiscal policies for industrial development regimes, for example, through the implementation of article 18 of the PFI.

- Taking measures to create regional coherence in the SADC approach on subsidies to avoid undermining article 19.1 of the SADC Protocol on Trade.

- On customs and trade facilitation it is important to give precedence to the regional agenda on customs and trade facilitation reforms, further due to the punitive EPA regime on non-cooperation in administrative matters, it is important for the rest of the SADC states to follow the TDCA or the SADC EPA route in order to achieve regional coherence.

- The SADC countries under the EAC IEPA and the ESA IEPA should consider the cohesive effect of adopting the procedure under the TDCA and the SADC IEPA with respect to TBTs and SPS measures.

- To avoid regional discrepancies on the development aspect of the EPAs it is essential that some level of cohesion should be developed on the actual deliverables expected from the EC in support of the development chapter of the EPAs.

The above recommendations require the appropriate recognition of the role played by the original economic integration institutions in the SADC region.

6. Conclusion

The SADC States should take the EPAs process as an opportunity to correct the tensions within the SADC regional integration agenda. This means resolving those tensions that existed before the EPA process started and dealing with issues arising out of the EPA negotiations to deepen the regional integration process. This is an urgent process that requires significant political commitment as it involves, in some member states, making decisions on whether or not to proceed with competing regional integration processes where these members belong to another REC, and where there is no consistency with the SADC agenda.

I. Background and Introduction to the SADC Regional Integration Agenda

1. Introduction

The Southern African Development Community (SADC) dates back from the formation in 1975 of the Frontline States which originally consisted of Botswana, Mozambique and Tanzania, Angola joined in 1976. The group changed into the Southern African Development Coordinating Conference (SADCC) in 1980 following the July 1979 Arusha Conference which agreed to launch the SADCC to forge links to create equitable regional integration. In 1992 the SADCC was transformed into the Southern African Development Community (SADC) by the signing of a treaty which defined the SADC membership's binding commitments to focus more on deepening economic cooperation and integration and on tackling the barriers to economic development in the region. By then the SADC membership had grown to 14 countries.

1.1 Outline of the SADC regional integration process

This section outlines the SADC regional integration process. The section discusses the plans, timeframes, milestones and targets under the SADC regional integration process and focuses specifically on the economic development agenda. The aim of this section, apart from identifying the regional integration plans is to assess how far those plans have been achieved, identify the barriers to deeper integration, and set the background for the analysis of the impact of the Economic Partnership Agreements (EPAs) on the regional integration process. In short, the exercise is to identify what has been done so far and what needs to be done with respect to the regional integration process, and how the EPAs negotiations affect that process.

1.2 Justifications for the study and objectives

The preamble to the SADC Treaty is clear that the SADC leadership is conscious of the duty to promote the interdependence and integration of SADC national economies for the harmonious, balanced and equitable development of the Region. In August 2008, the then Chairperson of SADC offered three reasons why the SADC regional integration project is crucial:

- Firstly, none of the SADC countries will be able to assure political and social stability, security and economic development if the region as a whole continues to grapple with underdevelopment, instability, poverty and marginalisation;

- Secondly, regional economic cooperation and integration offers the SADC countries an opportunity to pool their limited resources and build an economic base to address the challenges of economic development;

- Thirdly, regional economic integration can create the basis for regional markets, to achieve economies of scale, and enhance competitiveness as a platform to participate more effectively in the world economy.[1]

It is in this context that the SADC Secretariat with the support of the UN Economic Commission for Africa launched this study which looks into the impact of the EPAs.

The study:

i) carried out a detailed assessment of the impact of the EPAs concluded and/or expected to be concluded by the SADC Member States on the wider SADC regional integration process; and

ii) made specific recommendations on how the SADC region can ensure that the EPAs do not undermine their regional integration process but rather reinforce it.

1.3 The SADC Common Agenda: milestones in economic development co-operation

The SADC states agreed under article 5 of the SADC Treaty that one aspect of their common agenda is the promotion of sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa through regional integration. In order to achieve this aspect of the common agenda SADC states are required to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the region generally. To enhance this process article 21 of the SADC Treaty identifies trade, industry, finance, investment and mining as some if the areas for co-operation amongst member states. In pursuit of co-operation in these areas the SADC states agreed on the Protocol on Trade (1996), the Protocol on Finance and Investment (2006), and the Protocol on the Facilitation of Movement of Persons (2005). However as will be discussed below these agreements have not been adopted or signed by all SADC member states.

The Protocols are to be read with the Regional Indicative Strategic Development Plan (RISDP). The RISDP sets up a logical and coherent implementation programme of the main activities necessary for the achievement of the region's goals. The objective of the RISDP is to deepen the integration agenda of

[1.] Statement of the Chairperson of the SADC and the President of South Africa, Thabo Mbeki, on the occasion of the launch of the SADC Free Trade Area, Sandton, South Africa, available at ww.info.gov.za/speeches/2008/

SADC with a view to accelerating poverty eradication and the attainment of other economic and non-economic development goals. For the purposes of the trade/economic liberalisation and development agenda the RISDP sets out the targets detailed in Box 1 below.

Box 1: RISDP Sectoral cooperation and integration intervention areas

Trade/economic liberalisation and development

Target 1: Establishment of a SADC Free Trade Area - 2008;

Target 2: Completion of negotiations of the SADC Customs Union - 2010;

Target 3: Completion of negotiations of the SADC Common Market - 2015;

Target 4: Diversification of industrial structure and exports with more emphasis on value addition across all economic sectors - 2015 taking into account the following indicators:

- Diversify (increase of non-traditional exports) and sustain exports growth rate of at least 5% annually;
- Increase in intra-regional trade to at least 35% by 2008;
- Increase in manufacturing as a percentage of GDP to 25% by 2015.

Source: SADC Secretariat, RISDP

Table 1 below summarises the milestones on the SADC economic development agenda.

Table 1. Trade liberalisation achievements/milestones

Date	Milestone
August 1996	Adoption of the Protocol on Trade. The protocol initiated negotiations towards a Free Trade Area.
January 2000	The negotiations for the FTA were completed and the SADC Protocol on Trade entered into force.
September 2000	Implementation of the Protocol on Trade commenced. A target of achieving a Free Trade Area within a period of eight years was set.
May 2007	The SADC FTA was notified to the WTO in 2006 as required under the WTO framework. The WTO Committee on Regional Trade Agreements concluded that the SADC FTA met the conditions for regional agreements as set out under the WTO rules.
January 2008	Establishment of the SADC FTA. 85% of all intra-SADC trade is duty free. The remaining 15% of trade is to be fully liberalised by 2012.
August 2005	Seven Member State signed the SADC Protocol on the Facilitation of Movement of Persons.
August 2006	Seven Member States signed the SADC Protocol on Finance and Investment. In December 2009 Namibia signed the Protocol, as a result all members have signed it whilst ratification is pending.

Source: SADC Secretariat

1.4 Implementation of Trade/Economic Liberalisation agreements

This section assesses how far the SADC states have gone in terms of implementing the common agenda on economic integration. This analysis serves as a background on the implications of the EPAs on the SADC regional integration agenda, in particular what the effects of the EPAs are on the identified economic integration processes discussed below.

1.4.1 The SADC Protocol on Trade

The Protocol on Trade is the major trade liberalisation instrument for the SADC regional integration agenda. The Protocol creates a number of obligations which are subject to the dispute settlement mechanism under article 32 of the SADC Treaty.

It is worth noting that the bulk of the Protocol deals with modalities for the liberalisation of trade in goods. There are no substantive provisions for the liberalisation of trade in services except for article 23 which provides that the "member states shall adopt policies and implement measures in accordance with their obligations in terms of the WTO's General Agreement on Trade in services (GATS), with a view to liberalising their services sector within the community."

Further the Protocol does not give any timeline for when such modalities for trade in services should be adopted and implemented; this is in sharp contrast with the treatment of the liberalisation timeframes for trade in goods as will be shown below. The same problems also affect the protocol's provisions of the adoption of measures dealing with trade related issues such as cross-border investment, intellectual property rights, and trade promotion and competition policy.

As noted above, the SADC FTA is now in operational as of January 2008. Free trade in goods within the SADC region is to be achieved through the elimination of barriers to intra-SADC trade within eight years from January 2008. The liberalisation of trade in goods is structured along the following processes:

- phased elimination of tariffs and non-tariff barriers (NTBs) (article 3.1.)
- phased reduction and eventual elimination of import duties;
- elimination of export duties (article 5)
- adoption of policies and implementation of measures to eliminate all forms of existing NTBs and avoidance of the imposition of any new NTBs
- elimination of import restrictions, such as quantitative restrictions (art.7)
- elimination of quantitative export restrictions (art.8).

1.4.1.1 Country tariff phase-down offers

The tariff-phase down process is meant to liberalise substantially all trade in the SADC region, whilst as of January 2008, 85% of all intra-SADC trade is duty free, the remaining 15% has to be liberalised by 2012. The following tariff-phase down offers based on a variable geometry level has been tabled by member states:

- Final differentiated offer of Mozambique to the SADC member states (excluding South Africa)
- Preliminary Differentiated offer of Malawi to the SADC members states (excluding South Africa);

- Final General offer of Mozambique to South Africa;

- Final SACU Offer to the SADC member states;

- Preliminary Differentiated Offer of Tanzania to the SADC member states (excluding South Africa);

- Preliminary General Offer of Tanzania to South Africa;

- Preliminary Differentiated Offer of Zimbabwe to the SADC member states; and

- Preliminary SACU General Offer of Zimbabwe.

The implementation of the SADC FTA faces a number of problems. First, three SADC countries (Angola, DRC, and Seychelles) are not yet part of the SADC FTA. Angola has not yet tabled its tariff phase-down offer. The DRC is yet to accede to the Protocol on Trade which serves as the basis for the SADC FTA. Seychelles is regarded as an informal member of SADC having been readmitted into SADC in 2007 but has not yet formally signed the SADC Treaty. Second, there are compliance issues relating to a number of SADC countries that have joined the FTA. A study[2] which audited the implementation of the Protocol made the following key findings:

- Four member states, Malawi, Mozambique, Zimbabwe and Tanzania were not up to date on the implementation of their tariff phase down schedules:

- Malawi has made only one tariff reduction in 2001 and no further reductions have been implemented by Malawi. Zimbabwe had not implemented the tariff reduction offer to SADC excluding South Africa. The tariff reduction for 2007 is the offer to South Africa, which applies to all SADC countries that do not have bilateral or other preferential trading arrangements with Zimbabwe.

- Following unilateral tariff reductions to the MFN rates by some member states, a number of tariff lines MFN rates are lower than current SADC applied rates. Furthermore Tanzania has implemented concessions to Kenya and Uganda through implementing the EAC common external tariff.

- Outside of SACU most of the intra-SADC trade is taking place under either COMESA or bilateral preferences. There has been a very modest increase between the non-SACU members and South Africa except for the recent increase in apparel exports from Mauritius following the removal of SACU tariffs.

2. Audit of the Implementation of the SADC Protocol on Trade, Southern Africa Global Competitiveness Hub, August 2007.

- Following the implementation of the SADC Protocol on Trade several non-SACU countries (Malawi, Mozambique and Zimbabwe) renewed 'dormant' bilateral agreements to incorporate reciprocal preferences.

- Most member states had not revised their tariff offers for sensitive products, with the exception of Mauritius and Zimbabwe, which had updated a small number of products.

- The new trade being created by the Protocol is modest and the private sector has complained about the complexity of the SADC rules of origin. All members were found to be implementing either all or most of the trade facilitation instruments that had been rolled out by SADC, however, there are important trade facilitation instruments governing transit trade and bond guarantees that remain at the pilot stage and have yet to be rolled out to the region.

Third, it is not certain that the rest of the membership has achieved the 85% tariff liberalisation required by the FTA primarily because it is difficult to verify the compliance with the FTA due to lack of appropriate data from the member states. Identifying the products whose tariffs have been liberalised or those which have been classified as sensitive or excluded from liberalisation is not possible as member states have not made public any updates of the initial commitments made when the Protocol on Trade came into force in 2000. These implementation gaps create problems for the realisation of the planned SADC Customs Union since the full implementation of the FTA is meant to be the building block for the deeper regional integration of the SADC through the Customs Union. Further, the uncertainties in the actual liberalisation schedules are a barrier to intra-regional trade as exporters cannot make informed decisions on which products attract preferential treatment under the FTA. The fact that the Customs Union whose launch was scheduled for 2010 has been postponed indefinitely indicates the scale of the implementation problems of the FTA, and as will be discussed further below, the EPAs negotiations add more complications for the regional integration process.

1.4.2 Safeguarding the Protocol

There are five provisions which are meant to ensure that the regional integration aims of the Protocol are not frustrated. These provisions are important in the context of EPAs and they provide a framework within which the SADC member states are supposed to operate with respect to trade relations among themselves and with third countries. The provisions relate to:

- Preferential trade arrangements (article 27). Member states are permitted to enter into bilateral trade arrangements between themselves. However the overriding obligation is that such bilateral arrangements should not be inconsistent with the provisions of the Protocol. The provisions also requires member states with preferential trade arrangements that came in place prior to the Protocol to review the further application of such arrangements with a view to attaining the objectives of the

Protocol. This provision is not practical, it gives the review function to the member states concerned instead of giving this power to the institutional mechanism under the Protocol, especially the Council of Ministers.

- Most Favoured National Treatment (article 28). This provision requires member states to accord the most favoured nation treatment to one another and also to extend any privileges granted to a third country to the rest of the member states.

- Coordination of trade policies (article 29) and co-operation with third countries or groups of countries (article 30). Article 29 requires member states to try their best to coordinate trade policies and negotiating positions in respect of relations with third countries and international organisations. This is in order to facilitate and accelerate the achievement of the objectives of the Protocol. Article 29 should also be read with article 7(b) of Annex V to the Protocol which requires member states to develop "well articulated and coordinated community positions in international negotiations." However article 29 is a best endeavour clause which may easily be ignored. There is currently no coordination with respect to the SADC countries' engagement with third countries, the EPAs process is a good example of this lack of coordination.

- Finally article 33 requires member states to co-operate in addressing any impediments that may arise as a result of any action or lack of action by any member state on issues having material bearing on such trade.

Observance of these provisions should generally enhance regional integration and prevent the complexities that may arise from the conclusion of multiple trade arrangements that may not be consistent with the aims of the Protocol. The implication of the above provisions is that the Protocol requires member states to have the interests of the SADC community when engaging third countries in trade negotiations and agreements. The extent to which the EPA negotiations have affected the SADC regional integration process with respect to the provisions which are meant to safeguard the implementation of the Protocol will be discussed further below.

1.5 The Protocol on Finance and Investment

The Protocol on Trade refers to the need for co-operation in trade related aspects for regional integration without making substantive provisions on how such trade related issues are to be dealt with. The Protocol on Finance and Investment (FIP) goes some way towards making provisions for the achievement of regional integration through co-operation on trade related issues. The main objective of this Protocol is to enhance the SADC region's opportunities as an investment destination in the light of low investment in the region. The Protocol is sensitive to differences in the political and economic conditions in each SADC country. For example, article 20 of Annex 1 on Investment requires the member states to establish

conditions favouring the participation of LDCs in the SADC region in the economic integration process based on the principle of non-reciprocity and mutual benefit. Further the Protocol recognises that non-economic factors such as political risk can distort the regional integration process and attempts to cover this problem by creating the possibility of a Political Risk Insurance Guarantee Facility under article 11 of Annex 9 on Development Finance Institutions. It is important to highlight some of the essential aspects of the Protocol since the EPA negotiations also address similar aspects, the extent to which the EPA negotiations enhance or hamper the regional integration aspects of the FIP is discussed further below.

1.5.1 Co-ordination of investment policies

The Protocol seeks to foster harmonisation of the financial and investment policies of the SADC countries and to ensure that any changes to financial and investment policies in one SADC country do not necessitate undesirable adjustments in other SADC countries. Therefore article 2 of the FIP calls for the facilitation of regional integration, co-operation and co-ordination within finance and investment sectors of the SADC countries. To this end article 3 of the FIP requires the SADC states to "co-ordinate their investment regimes and co-operate to create a favourable investment climate within the Region."

1.5.2 Investment protection and non-discrimination

Article 5 of Annex 1 on Investment prohibits the nationalisation or expropriation of investments except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation. The Protocol obliges state parties to treat investors fairly and equitably and to extent treatment no less favourable than that granted to investors of a third country.

Whilst article 6 requires member states to extent the same privileges granted to third country investors to investors from the SADC region article 7 creates an exception that suspends this condition. Under article 7 the member states may, in accordance with their respective domestic legislation, grant preferential treatment to qualifying investments and investors in order to achieve national development objectives. This exception is to be read with article 7.3. which reads:

"The provisions of article 3 shall not apply to advantages, concessions or exemptions which may result from a bilateral investment treaty, Free Trade Area, Customs union, economic Union, Monetary Union or other multilateral arrangement for economic integration in which a State Party is participating or may participate".

Article 7 does not do much to advance the objectives of the FIP but actually does the opposite. First the exception permits member states to give more favourable treatment to investors from outside SADC, this suspends the requirement for member states to treat investors fairly and equitably, and it goes against the whole objective of promoting SADC investors in other SADC countries. Further it is not clear what

the obligations of member states are with respect to the signing of agreements with third countries. The main obligation is the requirement to co-ordinate and harmonise investment policies and regimes. This is overturned by article 7.1 and article 7.3.

The FIP does not create a clear environment on how member states are to negotiate and implement agreements with third countries. This is in contrast to the Protocol on Trade which clearly states that priority is to be given to the significance of the aims of the Protocol and that third country agreements should not frustrate its objectives.

1.5.3 Harmonisation of legislation

The FIP requires member states to harmonise their legislation with respect to investment policies within the spirit of non-discrimination as set out under article 6. However there is no timeframe given for this important step towards regional integration on investment regimes. Article 7 merely states that member states "undertake to eventually harmonize their respective policies and legislation". This is an unfortunate provision as it does nothing concrete to put pressure on the SADC states to harmonise their investment policies and laws so that the aim of the FIP is achieved.

1.5.4 Competition policy

There is no substantive content on competition policy in the FIP. The FIP merely states that state parties "undertake through co-operation to advance a competition policy in the Region." The FIP does not provide any timeframes for this co-operation or state what form this co-operation should take, for example, whether all countries should adopt competition legislation or whether there should be a regional competition authority.

The above discussion indicates that there are no clear implementation modalities for the investment related co-operation of the SADC member states to occur. The absence of clear timetables to achieve the purpose of the FIP creates implementation problems which may result in better defined and competing investment regimes such as those being negotiated under EPAs getting precedence over the regional process. The point is amplified further below with respect to the discussion on the lack of linkages between the investment related aspects of the EPAs and the FIP.

1.6 Movement of natural persons Protocol on the Facilitation of Movement of Persons

In 2005 seven SADC states signed the Protocol on the Facilitation of Movement of Persons. The preamble to this protocol recognises that the process of building the region into a Community is "only possible where citizens of the Community enjoy freedom of movement of persons, namely: visa-free entry, residence and establishment in the territories of Member States." The Protocol protects the rights of SADC citizens with respect to establishment for the exercise of economic activity within SADC countries.

This protection includes provisions against indiscriminate expulsion and it is a very important provision that has potentially positive linkages with the investment regime liberalisation in the SADC region. The proposed regime for the movement of persons contains provisions on the right of establishment which is absent from the FIP, such a right enhances the investment climate and reassures potential investors from the region.

In terms of article 4 of the Protocol, the timeframe for the implementation of the objectives of this Protocol shall be determined by the Implementation Framework to be agreed upon by State Parties six months from the date of signature of the Protocol, by at least nine (9) Member States. However to date only seven member states have signed this Protocol, hence there is no agreed Implementation Framework for the Protocol. As a result the Protocol remains an intention that has not yet been put into practice. There is no sign of when the Protocol will be put into operation and there is no implementation framework that has been agreed upon. Five SADC members are yet to sign this protocol[3] and only Mozambique has ratified the Protocol.

The above scenario is a great barrier to the free movement of persons within the SADC region. It is further complicated by the fact that some SADC member states have made commitments to liberalise the movement of persons in other agreements competing with the SADC regional agenda. The case of the SADC members who are also members of COMESA is a direct example of this complication. The COMESA bloc has already made commitments to liberalise the movement of persons within its member states.[4]

1.6.1 SADC regime for the movement of natural persons- Inconsistencies with the SADC Protocol on Trade and GATS commitments

There is no real impetus to move this protocol towards its implementation. Apart from the SADC membership's lack of actual will for its implementation the Protocol also has a problem if one reverts to its linkages with the Protocol on Trade.

It is important to consider the free movement of persons within SADC with article 23 of the Protocol on Trade which provides that the "member states shall adopt policies and implement measures in accordance with their obligations in terms of the WTO's General Agreement on Trade in services (GATS), with a view to liberalising their services sector within the community." The GATS positions of SADC countries with respect to the movement of persons are the exact opposite of the objectives of the Protocol on the Facilitation of Movement of Persons.

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3. Angola, Botswana, Malawi and Mauritius, whilst Madagascar and Seychelles are yet to accede to the Protocol.
4. Report and decisions: 17th Meeting of the COMESA Council of Ministers report, 4-5 June 2004, Kampala, Uganda.

Makochekanwa and Maringwa[5] notes that of the 14 SADC countries five made no commitment in the area of movement of labour, while those that have made commitments limit their market opening to highly skilled persons only. This position flies in the face of the intentions of the SADC Protocol on the Facilitation of Movement of Persons. The table below shows the GATS commitments made by SADC countries on the movement of natural persons.

Table 2: Commitments made by SADC countries under the GATS modalities for the Presence of Natural Persons

Country	Limitations to market access	Limitation on national treatment
Angola	No commitment	No commitment
Botswana	ABC	DE
DRC	No commitment	No commitment
Lesotho	ABC	None
Madagascar	No commitment	No commitment
Malawi	ABC	D
Mozambique	No commitment	No commitment
Namibia	AB	No commitment
Seychelles	N/A	N/A
South Africa	ABE	D
Swaziland	No commitment	No commitment
Tanzania	No commitment	No commitment
Zambia	ABC	D
Zimbabwe	AB	D

Source: Makochekanwa and Maringwa[6]

Key: A = limited access to highly skilled persons only; B = limited to employees of companies operating in the country; C = development of locals required; D = no discrimination for those permitted to enter under market access commitment only; E = professional need to be domestically registered. NB Seychelles is not a member of the WTO.

By deferring to the SADC membership's WTO obligations the Protocol on Trade makes the implementation of the Protocol on the Facilitation of the Movement of Persons particularly difficult because almost all the SADC countries adopted restrictive positions on that subject at the WTO level. Hence the main

5. Increasing temporary movement of natural persons in the SADC region; what should be done? Trade and Industrial Policy Strategies, December 2009.
6. Footnote 5 above refers.

trade policy instrument under SADC does not enhance the purpose of the instrument that attempts to liberalise the movement of natural persons within SADC. It is essential that the SADC countries take action to align these two regimes if at all the lack of political will to achieve the liberalisation of the movement of natural persons is there. The current limited commitments on the movement of natural persons within the SADC integration process will further be complicated by the possibility that the EU may be able to acquire GATS-plus commitments from some of the negotiating configurations which will liberalise the movement of natural persons between the relevant configurations before an intra-SADC agreement on the liberalisation of the movement of natural persons is achieved. The issue is discussed further below with respect to the trade-related aspects of the EPA negotiations.

The next section discusses the actual intra-SADC trade flows against this background.

II. Intra-SADC Trade as a Tool for Regional Integration

The above section discussed the policy and legal framework for the SADC regional integration agenda. It is important to consider the impact of this process on the actual intra-SADC trade flows.

More than half of SADC member-states are LDCs that still rely on natural resources and commodity exports to fuel industrial growth and development. Most of the SADC countries also have small markets, narrow capital and productive bases and undiversified economies which are locked into commodity dependent export paths.

Table 3 below shows the sizes of the SADC economies relative to the COMESA, EAC and this is complemented by a continental comparison along the full African Union membership.

Table 3: Economic performance of SADC countries and the total value of the AU, COMESA, SADC, and EAC Market, 2007

Country	GDP, US$'Million	Population, Millions	GDP per capita, US$	GDP Country share
AU Total	1,065,228	917,564	1160.93	
COMESA Total	286,775	398,130	720.30	
EAC Total	46,593	121,571	383.26	
SADC Total	379,256	248,002	1,529.25	
South Africa	277,581	47,391	5,380.60	40.84
Angola	58,547	16,391	2,686.41	7.05
Tanzania	16,181	39,477	323.83	2.05
Zambia	11,363	11,862	919.49	1.75
Botswana	11,781	1,758	5,874.86	1.65
DRC	8,955	59,338	143.97	1.37
Mozambique	7,752	20,144	377.68	1.22
Mauritius	6,363	1,253	5,146.05	1.03
Namibia	6,740	2,051	3,106.78	1.02
Madagascar	7,326	19,087	288.1	0.88
Zimbabwe	3,418	13,086	382.85	0.80
Swaziland	2,648	1,126	2,351.69	0.42
Malawi	2,232	13,163	169.57	0.36
Lesotho	1,476	1,789	825.04	0.24
Seychelles	750	86	8,720.93	0.12

Source: World Bank, 2006 data[7]

[7.] World Bank (2006) World Development Indicators. World Bank: Washington DC.

The above table shows that South Africa contributes to more than 40% of the SADC bloc's GDP. South Africa is also the region's diversified economy which has a relatively wider manufacturing and services sector. Table 4 below shows the major export products of the SADC countries.

Table 4: Main export products of SADC countries in 2009

Country	Commodities
Angola	Diamonds, oil, minerals, coffee, fish & timber
Botswana	Diamonds, copper, nickel
Lesotho	Clothing, wool, livestock
Madagascar	Clothing, crustaceans
Malawi	Unmanufactured tobacco, tea, sugar
Mozambique	Unwrought aluminium, , electrical energy, unmanufactured tobacco, Seafood, cotton
Mauritius	Clothing, sugar, fish
Namibia	Diamonds, copper, gold, zinc, lead, uranium, livestock
Seychelles	Fish, beverages, tobacco
Swaziland	Sugar, wood pulp, minerals
South Africa	Platinum, coal, machinery and transport equipment,-ferro alloys
Tanzania	Gold, precious mineral ores, fish
Zambia	Refined copper, copper ores and concentrates, cobalt mattes, , tobacco
Zimbabwe	Unused postage or similar stamps, inedible crude materials, cut flowers, unmanufactured tobacco, cotton, agricultural products, gold, minerals

Source: Compiled from COMTRADE data[8]

The above table points to a lack of diversification and manufacturing capacity in the SADC economies. The character of regional economies contributes to the current weak intra-SADC trade. Since most of the SADC countries produce primary products value added products are imported from either South Africa or elsewhere, usually in the developed and emerging economies. Similarly the primary export destinations for goods from the SADC countries are the developed economies, in particular the EU market. Table 5 below shows the export destinations of SADC goods over two periods, 2000 and 2007. The periods are significant in that the earlier year is when the SADC Protocol on Trade came into force, whilst the later covers the period just before the SADC FTA was formerly launched.

8. The COMTRADE data for 2009 does not include export profiles for Angola, the DRC and Lesotho.

Table 5: Share of intra-SADC trade in 2000 and 2007

Export destination in 2000	Total share of SADC exports (%)	Export destination in 2007	Total share of SADC exports (%)
Intra-SADC	16.20	Intra-SADC	15.75
EU	39.0	EU	37.0
USA	9.0	USA	10.0
Asia	14.0	Asia	25.0
Others	22.0	Others	12.0

Source: Modified from TIPS[9]

Table 5 shows that the export profiles of the SADC states are directed largely to the EU market, with the Asian markets having almost doubled their share of SADC exports, and the rate of intra-SADC exports actually fell over the two periods. Compared to the rest of the world's share the share of intra-SADC exports is very low. The figures also appear very minimal if the data is disaggregated to show the country level exports. Table 6 below shows the top export partners of the SADC countries, and where applicable, the proportion of exports to other SADC countries as a share of the total exports in 2009.

Table 6: Top export partners of SADC countries and highest intra-SADC exports in 2009[10]

Country	Top export partner and share of total exports (%)	Exports of SADC countries as share of total exports (%)
Botswana	UK- 56.8	South Africa- 20.2, Zimbabwe- 4.4, Zambia 0.79
Malawi	Belgium- 13	South Africa- 10
Mauritius	UK- 32.6	Madagascar- 4.3, South Africa- 3
Madagascar	France- 33	-
Mozambique	Netherlands- 41.6	South Africa- 21.4, Zimbabwe- 3.4, Malawi- 2.1
Namibia	South Africa- 31.8	Angola 8.5
Seychelles	Saudi Arabia- 26.8	-
South Africa	China- 10.5	Zimbabwe- 2.9. Mozambique- 2.9
Swaziland	South Africa- 79.8	Namibia- 2.7, Mozambique-1.8, Botswana- 0.29, Zambia- 0.13, Lesotho- 0.1
Tanzania	Switzerland- 19.6	South Africa- 6.3, DRC-2.8
Zambia	Switzerland -47	South Africa-9.1, DRC-6.9, Zimbabwe-1.9
Zimbabwe	South Africa-52.54	Mozambique-4.3, Zambia -3.6, Botswana- 1.6.

Source: Compiled from COMTRADE 2010

9. Trade Effects of regional Economic Integration in Africa: The case of SADC, by M. Negasi, Trade and Industrial Policy Strategies (TIPS) December 2009. www.tips.org.za/.../trade-effects-regional-economic-integration-africa-case-sadc

10. The COMTRADE data for the 2009 period does not include Angola, the DRC and Lesotho.

The above table amplifies the fact that the direction of SADC trade is skewered towards Western Europe with very little trade amongst SADC countries. Further trade patterns for the SADC countries are concentrated among very few partners which are non-SADC countries. The exception to this is South Africa, and to an extent, Malawi whose trade in 2009 was diversified across a number of partners. However it is also important to consider the effects of the Protocol on Trade and its effects on intra-SADC trade as this is also relevant to the discussion on the impact of the EPAs on regional integration. The case study below considers the trade effects of regional economic integration in the SADC countries.

Box 2: Trade effects of regional economic integration in Africa: the case of SADC

The study analyzes trade creation and diversion effects of the SADC using disaggregated data from 200 and 2007. The results show that the intra-SADC trade is growing in fuels and minerals, and heavy manufacturing sectors while displaying a declining trend in agricultural and light manufacturing sectors. This implies that SADC has displaced trade with the rest of the world in the fuel, minerals, and heavy manufacturing sectors. The SADC has served to boost trade significantly amongst its members rather than with the rest of the world in these sectors. The absence of local productive capacity in most SADC countries has provided an opportunity for South African exporters of processed and high value products. However, the increasing trend of extra-SADC trade bias over the sample period in both agricultural commodities and light manufacturing sectors means that there has been a negative trade diversion effect. The results suggest that the SADC countries retained their openness and outward orientation despite having signed the Protocol on Trade to enhance intra-SADC trade.

The study recommends the further elimination of tariff and non-tariff barriers as means of increasing intra-SADC trade.

Source: TIPPS[11]

The intra-SADC trade rates fall far low of the RISDP target of achieving at least 35% intra-SADC trade by 2008.

The SADC scenario can be compared to the COMESA which also has SADC countries amongst its membership. With a total market of over 400 million people COMESA has seen intra-regional trade, especially for the 14 countries participating in the FTA jumping five-fold from US$3.2 billion in 1997 to US$15.2 billion by 2009. This level of intra-COMESA trade is set to increase following the harmonisation of laws, regulations, procedures and standards by member-states aimed at promoting free intra-regional movements of factors of production (labour and capital), goods and services. The region has also adopted

[11]. See fiitbite 8 above.

international trade policy tools;[12] and trade facilitation instruments[13] that are supported by member states' cooperation on key strategic areas.[14] In line with regional agenda, COMESA has adopted common external tariff (CET) levels: 0% for capital goods, 5% for raw materials, 10% for intermediate goods and 25% for finished goods. COMESA has designed single rules of origin; simplified its customs procedures; eliminated such non-tariff barriers as import licensing; and removed exchange controls and import and export quotas. While it is too early to assess commitment in implementation, the adoption of a CET points to the collective desire to improve market competitiveness of member-states' products compared to products originating from outside the region.

2.1 Non-tariff barriers

While the SADC Trade Protocol calls for systematic phase-down of tariffs by all member-states, there are still many factors that constitute barriers to intra-regional trade. The region also has to deal with various trade liberalisation schedules and lists of sensitive products that have also influenced the IEPAs outcomes. This has direct impact on intra-regional trade and development. There is a wide range of non-tariff barriers (NTBs) in the region.

These include transaction costs faced by individual firms; communication problems; customs procedures and charges; transport problems; lack of market information; financial, poor electricity and technical support services; and standards and certification and/or technical restrictions. Furthermore, regional exporters face serious bureaucratic and physical hindrance such as road charges, transit fees and administrative delays at boarder and ports. In addition, there are challenges relating to lack of coordination and harmonisation of policies and regulations at the regional level. Raja (2009) singles out inefficiencies of border procedures including frequent breakdown of electronic systems for document lodging, poor coordination in the inspection of goods, overzealous inspection of goods, insufficient opening times at the point of entry and delays in duty refunds as major hindrance to the growth and development of intra-regional trade in Africa.[15] This is true in Southern African region though measures are under way to improve the situation. For instance, some border posts are opening for longer hours, a development that is set to bolster intra-trade flows and regional development.

2.2 The Cotonou Agreement and the SADC Integration Agenda

12. HS classification and GATT Valuation Code.
13. Single customs declaration document, carriers' licence, the Yellow Card, axle load limits and harmonised vehicle dimensions.
14. Finance, agriculture, industry, communication, energy, environment, health, tourism and transport.
15. Raja, Kanaga. (2009). Africa needs deeper regional integration in response to global crisis, In Africa Trade Network, Third World Network-Africa, Vol. 3., No. 2., June 2009.

The Cotonou Agreement was signed in 2000 between the EU member states and the Africa, Caribbean and Pacific (ACP) States. The Agreement provided for the continuation of the non-reciprocal trade preferences accorded to the ACP States under the Fourth (Lome) ACP-EC Convention as a transitory arrangement ending on 1 January 2008. The Agreement gave the ACP-EC countries from 2002-2007 to negotiate new WTO compatible trade arrangements (Economic Partnership Agreements (EPAs) providing for the progressive removal of barriers to trade between them and enhancing cooperation is all areas relevant to trade. This section of the study examines the key aspects of the Cotonou Agreement as they affect regional integration in the SADC region. The section also discusses the current status of the EPAs process.

2.2.1 Significance of regional integration in the Cotonou Agreement

The Agreement is the legal basis for the EPAs process. It sets the framework for the EPAs negotiations as well as for development cooperation. Regional integration is given specific attention as a necessary process for the achievement of the Cotonou Agreement's objective of eradicating poverty in the ACP regions and integrating them into the world economy. The following commitments as provided for in the Cotonou Agreement clearly show that the purpose behind the agreement was to enhance and not to disrupt existing regional integration initiatives of the ACP countries:

Box 3: Commitments to regional integration under the Cotonou Agreement

- Regional and sub-regional integration processes which foster the integration of the ACP countries into the world economy in terms of trade and private investment shall be encouraged and supported (art. 1)
- Differentiation and regionalisation: cooperation arrangements and priorities shall vary according to a partner's level of development, its needs, its performance and its long-term development strategy. Particular emphasis shall be placed on the regional dimension. (art.2)
- Accelerate diversification of the economies of the ACP States; and coordination and harmonisation of regional and sub-regional cooperation policies (art. 28.d)
- Developing and strengthening the capacities of regional integration institutions and organisations set up by the ACP States to promote regional cooperation and integration, and national governments and parliaments in matters of regional integration (art. 29)
- Promoting cross-border investments both foreign and domestic, and other regional or sub-regional economic integration initiatives (art.29)
- Economic and trade cooperation shall build on regional integration initiatives of ACP States, bearing in mind that regional integration is a key instrument for the integration of ACP countries into the world economy. (art.35.2)
- Negotiations of the economic partnership agreements will be undertaken with ACP countries which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group, taking into account regional integration process within the ACP. (art.37.5)

Source: The Cotonou Agreement

Given the emphasis on regional integration in the Cotonou Agreement it is reasonable to expect that the various groupings that with which some ACP countries chose to engage the EC with would have reflected the existing regional economic communities and their regional integration goals. However the actual EPA negotiations and the resulting interim agreements resulted in outcomes very different from the regional integration objectives of the Cotonou Agreement and the stated economic integration objectives of the SADC countries. The specific aspects of the EPA negotiations which have a direct impact on the SADC regional integration agenda are discussed in detail below.

2.3 Actual EPA groupings and impact on article 29 of the Protocol on Trade

An immediate impact of the EPAs process was the fragmentation of the SADC bloc which instead of negotiating as the existing regional economic community had its membership split into four groups. The 15 member bloc split into the following configurations:

1. The SADC EPA Configuration: Angola, Botswana, Lesotho, Mozambique, Namibia, Swaziland and South Africa;

2. The East and Southern Africa (ESA) Configuration in which Malawi, Mauritius, Madagascar, Seychelles, Zambia and Zimbabwe joined other COMESA member states around a loose configuration (ESA);

3. The Central African Configuration; in which the DR Congo joined other central African countries; and

4. East African Community (EAC) Configuration; which Tanzania joined.

The above groupings clearly go against the spirit of the SADC Protocol on Trade, in particular, articles 29 and 30, which require a co-ordinated approach and cooperation in the trade policies of the SADC countries especially when engaging with third countries for the purpose of negotiating preferential trade agreements. The very composition of the SADC countries for the purposes of the EPA process does not reflect any attempt at a coordinated approach to the engagement with the EC. Consequently the regional integration bias contained in the Cotonou Agreement is not apparent in the manner with which the SADC countries configured themselves for negotiating the EPAs. The fragmentation of the SADC bloc in this instance has negative implications on the gains made so far with respect to regional integration and any further plans for SADC to achieve a common market status and adds complications to the envisaged customs union for which a SADC common external tariff is a requirement. The significant regional integration instrument, the Protocol on Trade was not at all followed when SADC states regrouped themselves according to the above four configurations. The EAC on the other hand was not so affected since Tanzania joined the configuration for the purposes of the interim EPA. The extent of the impact

on the SADC regional integration agenda will be more apparent in the subsequent sections of this study which discuss the EPA contents and the sectoral issues.

2.4 Current status of the EPA process

The EC concluded a full EPA with the CARIFORUM region; however by December 2007 the negotiations had not produced agreement for a full EPA with the various African regions and Pacific states. As a result the negotiations produced an interim arrangement, the Interim Economic Partnership Agreements (IEPAs) of which not all the African negotiating blocs signed. Table 7 shows the status of the IEPAs per individual SADC country.

Table 7: Overview of SADC signatories of the Interim EPAs

Country	Liberalisation of EU imports	Signatory to IEPAs	Submitted list of sensitive products to EU for exclusions from liberalisation
Angola		No	No (Did not initial IEPA)
Botswana	90%	Yes, 4/6/2009	Yes
DRC		No	No
Lesotho	90%	Yes, 4/6/2009	Yes
Madagascar	81%	Yes, 4/9/2009	Yes
Malawi		No	No
Mauritius	96%	Yes, 4/9/2009	Yes
Mozambique	96%	Yes, 15/6/2009	Yes
Namibia	90%	No	Yes (Initialled IEPA)
Seychelles	98%	Yes, 4/9/2009	Yes
South Africa	90%	No	Yes (Did not Initial IEPA)
Swaziland	90%	Yes, 4/6/2009	Yes
Tanzania		Yes	Yes
Zambia	80%	No	Yes (Initialed IEPA)
Zimbabwe	80%	Yes, 4/9/2009	Yes

Source: compiled from the IEPAs

The IEPA cover the modalities for the liberalisation of trade in goods and also make provision for in-built negotiations for a comprehensive EPA to cover other trade related areas. As Table 7 shows some countries did not sign the IEPA, and some initialled it showing that they had various concerns which prevented them from signing the IEPA.

In the SADC EPA Configuration Namibia initialled the IEPA but with reservations. South Africa and Angola did not initial the IEPA due to a number of concerns including the implications of the IEPA on the SACU arrangement and the SADC regional integration process. Whilst the further negotiations include services, investment, competition policy, and government procurement, Namibia, Angola and South Africa are not involved in the negotiations on these four areas.

In the Central African Configuration the DRC did not sign the IEPA. The only country to initial the IEPA was Cameroon. The negotiations with the rest of the configuration including the DRC are still on-going, issues of concern being market access, rules of origin, product coverage, MFN principle, the non-execution clause and the development dimension of the EPA.

In the ESA Configuration Malawi did not initial the IEPA. The other SADC members initialled the IEPA at the end of 2007. The ESA countries are negotiating with the EC for a comprehensive EPA with sticking points being the definition of "substantially all trade", the timeframe for trade liberalisation, scope and inclusion of the MFN clause, modification of tariffs and treatment of export quantitative restrictions.

In the EAC, Tanzania initialled a Framework EPA as part of the EAC Customs Union, the agreement is a framework for the negotiation of a comprehensive EPA. The issues still to be agreed upon include trade facilitation, SPS measures, TBT, rules of origin, trade in services, agriculture, trade related issues, dispute settlement and the development aspects of the EPA.

Section 3 discusses in detail, the contents of the IEPAs and the specific areas of convergence and divergence and assesses what impact these have on the SADC regional integration process. However it is also important to take into account the preceding discussion on the in-built problems with the SADC integration process.

III. The Interim Economic Partnership Agreements and the SADCRegional Integration Process

3.1 Trade in Goods

This section discusses and analyses the provisions of the IEPA signed by the SADC countries in the four configurations discussed in the previous chapter. The first section deals with the provisions of the IEPAs as they relate to arrangements for trade in goods. The second part deals with the content and scope of the current negotiations for trade related issues. Further the section also discusses the provisions of the TDCA between South Africa and the EC. The discussion then identifies the areas of convergence and divergence among the IEPAs and the TDCA and assesses the impact of these agreements on the SADC regional integration process.

3.2 Free trade areas

The four IEPAs establish free trade areas between the SADC countries and the EC on the basis of the principle of asymmetry commensurate with the specific needs and capacity of the SADC countries, in terms of levels and timing for commitments. For example in the SADC IEPA Part II (Chapter Four) of the Agreement sets out the provisions governing trade in goods between the SADC EPA States and the EU. This section of the agreement covers products falling within Chapters 01 to 97 (with the exception of Chapter 93), set out in the respective tariff nomenclature of SADC EPA states and the EC. The commitments for the liberalisation of trade in goods use the Harmonised Commodity Description and Coding System (HS). Below we discuss the regime for trade in goods, as well as the overall commitments made by the SADC countries in the four configurations under which they negotiated the IEPAs.

3.3 Standstill clause

Article 23 of the SADC EPA (the equivalent clauses in the ESA and EAC IEPAs are articles 14 and 13 respectively) provides that no new customs duties shall be introduced, nor shall those already applied be increased in trade between the SADC EPA States and the EC from the date of entry of the agreement. This clause effectively locks out the increase or introduction of new customs duties. This provision is to be read with article 24 which further widens the standstill clause. The provision reads:

"No new customs duties on exports, or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in the trade between the European Community and the SADC EPA countries from the date of entry into force of this Agreement."

The standstill clause has potentially negative implications for the SADC IEPA states in that customs duties serve as revenue sources and also provide some protection for infant industries. The agreement gives SADC EPA states some room to circumvent the potentially negative effects of the standstill clause by providing for its temporary suspension in exceptional circumstances. This is possible where the SADC EPA States can justify specific revenue needs, protection of infant industries, or protection of the environment as necessitating the introduction of temporary export taxes or charges having equivalent effect on a limited number of additional products. However this is not a unilateral process as the SADC EPA states are required under article 24.2. to consult the EC before taking the decision to suspend the standstill clause. Article 24 is reviewable within the three year period from the entry into force of the agreement (2011).

3.3.1 Differences over the standstill clauses

Concerns have been raised regarding the limiting nature of the standstill clauses in the four IEPAs as they relate to tariff modification, for example, under the ESA IEPA this has led to the EC agreeing in principle to grant the ESA group the same flexibilities found under the CARIFORUM-EC EPA (articles 16(6) and 17).

3.4 Infant industry protection

Industrialisation is important to addressing the developmental challenges faced by SADC. Both SADC and ESA configurations have in the re-negotiations on the infant industry come up with standalone infant industry provision. Countries in these two groupings had made the case during the negotiations for infant industry provisions that would not expire after 10-15 years as reflected in the old text. The understanding promoted by the old text created the impression that after 10-15 years there would not be any infant industries. Furthermore, the clauses were no more than ordinary safeguards that were really limited to mitigating the damage of import surges for existing sectors and did not cover for the building of new sectors. More than anything, the clauses were applicable for only a short time. The new stand alone clauses from SADC and ESA although reflecting an improvement to the old texts are still not without their challenges as will be discussed further below (See Boxex 4 and 5 below):

Box 4: ESA's Stand-alone Infant Industry Clause – to be Incorporated into a 'Full' EPA

The ESA States may temporarily suspend further reductions of the rate of customs duty or increase the rate of customs duty up to a level which does not exceed the applied MFN duty or introduce tariff quotas or a combination of these measures, where a product originating in the EC Party, as a result of the reduction of duties, is being imported into its territory in such increased quantities and under such conditions as to threaten the establishment of an infant industry cause or threaten to cause disturbances to an infant industry producing like or directly competitive products.

2 (a) Where a ESA Signatory State take the view that the circumstances set out in paragraph 1 exist, it shall immediately refer the matter to the EPA Committee for examination.

(b) The EPA Committee may make any recommendation needed to remedy the circumstances which have arisen. If no recommendation has been made by the EPA Committee aimed at remedying the circumstances, or no other satisfactory solution has been reached within 30 days of the matter being referred to the EPA Committee, the ESA Signatory State concerned may adopt measures in accordance with this Article.

(c) Before taking any measure provided for in this Article, the ESA Signatory State concerned shall supply the EPA Committee with all relevant information required for a thorough examination of the situation, with a view to seeking an acceptable solution.

(d) In the selection of measures pursuant to this Article, priority must be given to those which least disturb the operation of this Agreement.

(e) Any measure taken pursuant to this Article shall be notified immediately to the EPA Committee and shall be the subject of periodic consultations within that body.

(f) In critical circumstances where delay would cause damage which it would be difficult to repair, the ESA Signatory State concerned may take measures provided for in paragraph 1 on a provisional basis without complying with the requirements of sub-paragraphs (a) to (e). Such action may be taken for a maximum period of 200 days. The duration of any such provisional measure shall be counted as part of the period referred to in paragraph 3. In taking such provisional measures, the interest of all parties involved shall be taken into account. The importing ESA Signatory State concerned shall inform the EC Party, and it shall immediately refer the matter to the EPA Committee for examination.

3. Such measures may be applied for a period of up to 8 years. Application of the measures may be further extended by decision of the EPA Committee.

Source: 'Joint Conclusions', EC-ESA EPA Senior Official Meeting, 28 August 2009, Mauritius ESA

Box 5: SADC's Stand-alone Infant Industry Clause – to be Incorporated into a 'Full' EPA

1. Botswana, Lesotho, Namibia, Mozambique and Swaziland may temporarily suspend further reductions of the rate of customs duty or increase the rate of customs duty up to a level which does not exceed the applied MFN duty, where a product originating in the EC Party, as a result of the reduction of duties, is being imported into its territory in such increased quantities and under such conditions as to threaten the establishment of an infant industry cause or threaten to cause disturbances to an infant industry producing like or directly competitive products.

2. Measures adopted in accordance with the conditions of paragraph 1 by a SADC EPA State which is also a SACU Member State shall take the form of the levying of additional duties exclusively by the SADC EPA State invoking this provision.

3. (a) Where a SADC EPA State takes the view that the circumstances set out in paragraph 1 exist, it shall immediately refer the matter to the Trade and Development Committee for examination.

(b)The Trade and Development Committee may make any recommendation needed to remedy the circumstances which have arisen. If no recommendation has been made by the Trade and Development Committee aimed at remedying the circumstances, or no other satisfactory solution has been reached within 30 days of the matter being referred to the Trade and Development Committee, the SADC EPA State concerned may adopt measures in accordance with this Article.

(c) Before taking any measure provided for in this Article the SADC EPA State concerned shall supply the Trade and Development Committee with all relevant information required for a thorough examination of the situation, with a view to seeking an acceptable solution.

(d) In the selection of measures pursuant to this Article, priority must be given to those which least disturb the operation of this Agreement.

(e) Any measure taken pursuant to this Article shall be notified immediately to the Trade and Development Committee and shall be the subject of periodic consultations within that body.

(f) In critical circumstances where delay would cause damage which it would be difficult to repair, the SADC EPA State concerned may take measures provided for in paragraph 1 on a provisional basis without complying with the requirements of sub-paragraphs (a) to (e). Such action may be taken for a maximum period of 200 days. The duration of any such provisional measure shall be counted as part of the period referred to in paragraph 4. In taking such provisional measures, the interest of all parties involved shall be taken into account. The importing SADC EPA State concerned shall inform the EC Party, and it shall immediately refer the matter to the Trade and Development Committee for examination.

4. Such measures may be applied for a period of up to 8 years. Application of the measures may be further extended by decision of the Joint Council.

5. Article 25 of the TDCA shall continue to apply to South Africa.

6. SACU Member States shall have the right to have recourse to Article 26 of the SACU Agreement 2002.

3.5 Liberalisation commitments: impact on the SADC common market agenda

In terms of article 25 of the SADC IEPA the EC provided (from 1 January 2008) duty free and quota free (DFQ) treatment for all imports from Botswana, Lesotho, Mozambique, Namibia and Swaziland (the SADC-5), with transition periods for rice and sugar (2010 and 2015 respectively). Botswana, Lesotho, Namibia and Swaziland (BLNS) will liberalise 86% of EU imports over four years (2008-2012). The BNLS countries are members of SACU and the liberalisation period corresponds to that underway between South Africa and the EU under the TDCA. Mozambique will liberalize 81% of imports from the EU by 2023. Whilst the SADC-five countries liberalised mainly industrial and fisheries products they also provided a list of goods excluded from liberalisation, these cover mainly goods in the agricultural, textiles and processed agricultural sectors.

In the Central Africa IEPA Cameroon - signed an interim EPA in 2009, covering:

- duty and quota-free EU access for all goods from Central Africa
- gradual liberalisation (removal of duties and quotas) between 2010-25 up to 80% of EU exports to Cameroon.
- exclusion of Cameroonian sensitive sectors from liberalisation for the remaining 20% of exports (Cameroonian sectors still needing protection from EU imports, e.g. farm products like meat, flour and dairy products)

3.5.1 The EAC liberalisation schedule

The EAC-EPA is the only one with identical liberalisation schedules consisting of items to be liberalised over three periods, 2010, 2015-2023 and 2020-2033 and an annex of exclusions. Table 8 below shows the summary of the EAC-EPA liberalisation schedule.

Table 8: Summary of EAC liberalisation

	Number of tariff lines	Imports from EU Value (US$)	Imports from EU Share (%)
Annex IIa (2010)	1,950	1.615.331.216	65.4
Annex IIb (2015-23)	1,129	361.011.102	14.6
Annex IIc (2020-33)	960	64.864.376	2.6
Annex IId(exclusions)	1,390	428.818.834	17.4
Total	5,429	2.470.025.527	100.0

Source: adapted from Bilal and Stevens.[16]

Though the bulk of the EAC-EPA tariffs will be removed over the next 15 years, the EAC IEPA has the longest transition periods of all the IEPAS under discussion. According to the IEPA schedule 17.4% of imports are excluded from liberalisation though the exact products differ from country to country. In terms of total share of imports the largest category of exclusions relates textiles (8.7%).

In the ESA IEPA tariffs are to be reduced in 2013, 2014, 2016, 2017, 2020 and 2022 thus giving the ESA EPA group 15 years to liberalise their tariffs. The relevant liberalisation commitments under the ESA group are attached to this report as annexes.

The commitment schedules relating to the SADC EPA States, the EAS EPA and Central Africa EPA groups are attached to this report as annexes. The EAC schedule of commitments has been taken as an example in the main text of this report as it is fairly simple and it is an example of regional coherence in the liberalisation commitments.

3.5.2 Issues arising from the different liberalisation commitments.

Bilal and Stevens[17] analysed the liberalisation commitments made by the African countries in the various EPA configuration and assessed the potential implications on regional integration. The following issues arise from that assessment.

- The SADC EPA group. The SADC schedules show considerable incoherence. There is a strong similarity between the BLNS commitments and those of South Africa under the TDCA, but very little between these and Mozambique's regime. The removal of South Africa from the IEPA means that the BLNS countries now have a different liberalisation schedule vis-a-vis the EU than does

16. Bilal S and C. Stevens (eds) 2009. The Interim Economic Partnership Agreements between the EU and African States; contents, challenges and prospects. ECDPM Policy Management Report 17. Maastricht: ECDPM. www.ecdpm.org/pmr17
17. Above footnote refers.

South Africa under the TDCA, though the practical implications are expected to be minor since more than 90% of BLNS imports enter SACU via South Africa. However, in this South Africa has raised the issue and has warned that the issue will create trade policy divisions within the SACU membership.

- The ESA EPA group. There are incoherencies in the ESA group's commitments. The incoherence in the liberalisation schedules may cause a fundamental problem for the eventual implementation of a COMESA CET and these incoherencies relate to the differences on the schedules of exclusions adopted by the ESA group.

On the COMESA customs union project Bilal and Stevens note that new obstacles have been thrown up by the IEPA as a result of the split between initiallers and non-initiallers, the over-hasty forcing of precise definitions of products subject to the COMESA CET, and incoherent exclusion lists. The same point applies to the proposed SADC Customs Union which was proposed as part of the SADC common market agenda. As discussed above the SADC countries liberalisation commitments under the IEPAs are not harmonised and it should be noted that Madagascar, Mauritius and Zimbabwe's commitments are related to the COMESA CET. There is no common SADC list for liberalisation commitments under the EPAs. The absence of a common SADC position creates serious difficulties for the realisation of a SADC Customs Union, which by definition, requires a common set of tariffs. The proposed SADC Customs Union is therefore one clear casualty of the EPA negotiations. Further, variations in the liberalisation commitments of the SADC countries with respect to the treatment of imports from the EU create room for the application of strict border controls within the SADC region as customs authorities will inevitably attempt to prevent attempts by importers to circumvent higher duties in other SADC countries. Such added border controls slow down trade and have a negative impact on intra-SADC trade. The impact is also to slow down the implementation of the SADC Protocol on Trade which requires the elimination of both tariff and non-tariff barriers in order to enhance economic integration in the SADC region.

3.6 Most favoured Nation Treatment

All the four IEPAs contain the clause on the MFN treatment between the EC and SADC countries with respect to the conclusion of other trade agreements, basically the SADC countries are required to extend to the EC any more favourable treatment acquired from a conclusion of an FTA and vice versa. It is important to dwell on this issue because the IEPAs, although all catering for this provision, do not provide for similar clauses on the application of the MFN treatment. First it is important to appreciate what the general MFN clauses mean and second it is equally important to appreciate the meaning and implications of the differences on the application of this clause from one EPA to another as far as the SADC countries are concerned. Further the consultants also question whether this issue has any potential impact on the SADC regional integration process.

The general similarity in all the four IEPAs is the requirement for the signatories to accord to the EC Party any more favourable treatment applicable as a result of the signatories becoming party to a free trade agreement with any major trading economy. "Major trading economy" means any developed country, or any country accounting for a share of world merchandise exports above 1% in the year before the entry into force of the agreement, or, any group of countries acting individually, collectively or through an economic integration agreement accounting collectively for share of world merchandise exports above 1,5% in the year before entry into force of the economic integration agreement. There are differences in the provisions for the MNF treatment in the 4 IEPAs:

- Article 28.3 goes on to provide that "Where an SADC EPA State can demonstrate that it has been given by a third Party substantially more favourable treatment than that offered by the EC Party, the Parties will consult and jointly decide how best to implement the provisions of paragraph 2."[18] It is not clear what this provision means and whether the phrase "third Party" is referring to a "major trading economy". The issue is not trivial as the corresponding provision in the Central Africa EP (article 19.3) refers to Central Africa Party having received more favourable treatment from a "major trading partner" and not a "third Party" like the SADC IEPA does. On the face of it, it would appear as if more favourable treatment from any third party qualifies the SADC countries to consult with the EC on how best to implement the MFN treatment. In which case the SADC EPA narrows the range of options available to the SADC States. It is however far from clear what exactly this consultation involves or would lead to.

- Second the ESA IEPA clearly excludes the MFN treatment from applying in respect of trade agreements between the ESA states with other African countries and regions. The EAC IEPA goes further to add the Caribbean and Pacific Groups. The SADC IEPA does not do the same. Hence the ESA and EAC EPAs at least make provision for policy space in the choice of FTAs which they can negotiate without worrying about extending any advantages to the EU which is not the case with the SADC EPA.

3.6.1 Impact on regional integration; conclusion of future trade agreements

The differences amongst the four IEPAs with respect to obligations concerning FTAs and the EC show a lack of a coordinated and coherent approach by the SADC States. This becomes more pronounced when one considers the TDCA. The TDCA does not require South Africa to extend more favourable treatment acquired in another FTA to the EC. The South African government notes that "by excluding South Africa from the IEPA, while other SACU countries remain under this obligation, a wedge in SACU's common trade policy emerges. The MFN clause will limit the ability of ACP countries to diversify their

[18] The provision reads "the SADC EPA States shall accord to the EC Party any more favourable treatment applicable as a result of the SADC EPA States or any Signatory SADC EPA State becoming party to a free trade agreement with any major trading economy after the signature of this Agreement."

trade relations away from the EU as it will ensure that trade relations with the EU are privileged in perpetuity. Trade policy sovereignty will be compromised and leverage in any future negotiations will be undermined." [19]

The options that the SADC countries have for future trade relations with major economies is limited because SADC may not be able to move as a group due to reservations based on the implications of the MFN clause as it exists in the SADC IEPA. This has negative implications for the future regional integration process as countries like South Africa for example may move alone to conclude bilateral trade relationships with other major economies like China, Brazil and India which have reservations about the application of this clause in the EPA context. [20]

3.7 Non-tariff Measures

3.7.1 Trade defence instruments

All the four IEPAs provide for the application of trade defence instruments. Three types of trade defense instruments are provided for, that is anti-dumping and countervailing measures, multilateral safeguards and bilateral safeguards. Table 9 below shows the trade defence instruments under the four IEPAs.

Table 9: Trade defence instruments under the four IEPAs

SADC EPA	ESA EPA	EAC EPA	Central Africa
Anti-dumping and countervailing measures (art.32)	Anti-dumping and countervailing measures (art.19)	Anti-dumping and countervailing measures (art.19)	Anti-dumping and countervailing measures (art. 29)
Multilateral safeguards (art.33)	Multilateral safeguards (art.20)	Multilateral safeguards (art.20)	Multilateral safeguards (art.30)
Bilateral safeguards (art.34)	Bilateral safeguards (art.21)	Bilateral safeguards (art.21)	Bilateral safeguards (art.31)

Source: SADC-EC IEPA, EAC-EC IEPA. ESA-EC IEPA, Cameroon-EC IEPA

3.7.1.1 Anti-dumping and countervailing measures

The EAC, ESA and Central Africa IEPAs provide similar requirements for anti-dumping and countervailing measures. The three IEPAs give the parties an option to adopt, whether individually or collectively, anti-

19. The Interim EPAs: View from the South African Government, Xavier Carim, Deputy Director General, Department of Trade and Industry, Government of South Africa, Economic Paper Series No.09, German Marshal Fund of the United States, available at www.gmfus.org/publications/index

20. See for example the Communication from Brazil to the WTO General Council meeting of February 2008 WT/GC/W/585; included in the minutes WT/GC/M/113 available at www.wto.org.

dumping or countervailing measures in accordance with the relevant WTO agreements. Under these three IEPAs the EC is required to consider the possibility of constructive remedies under the WTO agreements before imposing definitive anti-dumping or countervailing duties in respect of products imported from the ESA, EAC and Central African countries. This obligation is binding on the EC and there is no corresponding obligation on the ESA, EAC or Central African countries. It is important to note the dispute settlement in the provisions ESA, EAC and Central Africa EPAs do not apply to anti-dumping and countervailing measures.[21] There is no positive statement in all the three IEPAs on which dispute settlement mechanism is applicable with respect to anti-dumping and countervailing measures. One can only assume that, since there is a reference to the WTO agreements, especially the obligation on the EC to consider constructive remedies under the relevant WTO agreements, then the applicable regime is the WTO Dispute Settlement mechanism. This is a weakness in the three IEPAs in that certainty on the dispute settlement mechanism is not spelt out.

On the other hand the SADC IEPA does not give the parties an option to formulate or adopt anti-dumping or countervailing measures. Instead article 32 provides that the rights and obligations of the EC and the SADC EPA states in respect of the application of antidumping and countervailing measures shall be governed by the relevant WTO Agreements. Further the SADC IEPA clearly stipulates that any dispute arising to these measures can only be settled through the WTO Dispute Settlement procedures. There is no other alternative dispute settlement regime for the SADC-EPA States. Hence the situation is such that for the dispute settlement mechanism is unclear for the SADC countries under the ESA and EAC configurations, whilst it is clear for the SADC countries under the SADC-EPA configuration. However it is not clear why the SADC EPA States locked out other dispute settlement mechanisms and opted only for the WTO process under which none of them has any experience and which is also a protracted and expensive process.

3.7.1.1.1 Situation under the TDCA

The EAC, ESA and Central Africa EPAs generally correspond to article 23 of the TDCA with respect to the adoption of anti-dumping and countervailing measures. However the TDCA has different mechanisms for the settlement of disputes. Under article 104 the Cooperation Council under the TDCA can settle any dispute between South Africa and the EC, so this includes disputes concerning the application of anti-dumping and countervailing measures. Article 104 of the TDCA stresses the need for the utilisation of the TDCA's dispute settlement mechanism without prejudice to the rights of the parties to have recourse to the WTO dispute settlement procedures. Whilst noting that the SADC EPA restricts the resolution of a dispute to the WTO procedures this also poses complications should South Africa eventually decide to sign the SADC EPA.

3.7.1.1.2 Relevance to the SADC regional integration process

The SADC Protocol on Trade does not prevent member states from adopting anti-dumping measures which are in conformity with the WTO provisions. Further, article 19 of the SADC Protocol on Trade allows the imposition of countervailing duties as long as they are in conformity with the WTO provisions.

21. See articles 19.7 (ESA and EAC EPAs) and 29.7 of the Central Africa EPA.

The SADC Protocol does not give the WTO rules precedent over the settlement of disputes arising from the application of anti-dumping or countervailing measures. The SADC's general dispute settlement mechanism under article 32 of the Protocol applies to anti-dumping and countervailing measures as a last resort with preference being given to the possibility of an amicable resolution of a dispute by a panel of trade experts. The linkages with the various EPAs that the SADC countries have signed/initialled create different dispute settlement regimes over the same subject matter; that is, the WTO regime for the SADC-EC EPA, the SADC regime for the SADC countries, and an unclear regime for the SADC countries under the ESA, EAC and Central Africa EPA which may or may not include the WTO system.

There is no coordinated position which the SADC countries have taken with respect to the anti-dumping and countervailing measures and the positions taken within the EPAs context do not advance the process under the SADC Protocol on Trade.

3.7.1.2 Multilateral safeguards

The four IEPAs have identical (save for minor differences) provisions for multilateral safeguards. However the four IEPAs do not create a procedure for the adoption and application of the safeguard measures. The agreements give the parties the option of adopting safeguard measures in accordance with Article XIX of GATT 1994, the WTO Agreement on Safeguards, Article 5 of the Agreement on Agriculture and any other relevant WTO Agreements. Further, under the four IEPAs the EC is obliged to suspend for 5 years the use of any safeguard measures on products from the SADC EPA, EAC EPA, ESA-EPA and Central Africa EPA countries owing to the economic differences between the EC and these countries. This obligation is reviewable not later than 120 days before the expiry of this 5 year period. The purpose of the review is to determine whether or not to extend the suspension of the EC safeguards on account of the development needs of the signatories to the four IEPAs. With the exception of the EAC-IEPA the review of this clause will not take place at the same time for the members of each of the rest of the configurations due to differences in the dates for signing of the EPAs, hence it is difficult to see how comprehensive the review will be, or how regional positions on the review will be adopted for purposes of coherence.

All the four IEPAs provide that the multilateral safeguards are not subject to the Dispute Settlement provisions of the agreements, again, in view of this uncertainty, it is safe to conclude that the intention is to have recourse to the WTO dispute resolution system. This poses problems for those Central African countries who are not members of the WTO, and in the SADC context, the same point applies for Seychelles which is not a WTO member.

3.7.1.3 Bilateral safeguards; lack of regional coherence and implications on regional industrial policies

All the four IEPAs make provision for the signatories to safeguard measures where a product originating in one Party is being imported into the territory of the other Party in such increased quantities as to cause or threaten to cause serious injury to the domestic industry of the other Party. The provisions on bilateral safeguards are identical in the four IEPAs with the exception of one vital aspect concerning the status of LDCs in the EPA configurations. All the four IEPAs permit the application of safeguards for a maximum period of 8 years but there are differences on for how long this option can be exercised. The divergences relate to:

- The SADC IEPA permits the application of bilateral safeguards by the SADC EPA States for a period of up to the first 12 years for Botswana, Namibia and Swaziland, or 15 years for the LDCs in the SADC IEPA. The application period can be further extended on review by the Joint Council in view of the overall level of development achieved by the SADC EPA states;

- The ESA IEPA permits such application for first 10 years for non-LDCs and 15 years for the LDCs in the ESA EPA. Unlike the SADC IEPA the ESA IEPA has no provision for the extension of the safeguard application period;

- The EAC IEPA provides for a period of the first 10 years for all the EAC members. There is no distinction made between non-LDCs and LDCs in the EAC IEPA for purposes of the safeguard application period. There is no clause allowing for the extension of this period on review; and

- The Central Africa IEPA provides for a safeguard application period of first 15 years. No distinction is made between LDCs and non-LDCs and there is no clause permitting the extension of this period on review.

Target 4 under the economic development aspect of the RISDP requires the diversification of SADC countries industrial structure and exports with more emphasis on value addition across all economic sectors. The safeguard application period is important to ensure that the development needs of the SADC countries are taken into account. The SADC EPA attempts to address this issue by allowing for the extension of the safeguard application period to address future policy needs for the protection of the industries of SADC EPA States. The rest of the IEPAs do not make provision for this important review clause thus depriving the rest of the SADC countries of this policy option. By not making a special case for LDCs the EAC and Central Africa EPAs prejudice the interests of Tanzania and the DRC respectively. Further Tanzania emerges as the only SADC LDC with the shortest (10 years) safeguard application period compared to the rest of the SADC LDC member states which have 15 years to utilise this policy option. These differences have a negative impact on regional integration especially through

the development of common industrial policies, in particular on infant industry protection, in aid of the common market agenda. It is difficult for the industrial development aspects (Target 4) of the RISDP to be achieved in the absence of common positions on the linkages between trade and industrial policies.

The lack of regional coherence on the application of safeguard measures is made even worse when the TDCA is considered.

3.7.1.3.1 Safeguard measures under the TDCA and significance of art.25 thereof

The TDCA has three provisions on safeguards, article 16 which addresses agricultural safeguards and article 24 which talks of safeguards in general, and article 25 which provides for transitional safeguard measures. The agricultural safeguard clause was inserted due to the particular sensitivity of the agricultural markets in the EC and South Africa. In the case of agricultural safeguards, where imports of products originating in the EC or South Africa cause or threaten to cause a serious disturbance to the markets of the other Party, the Cooperation Council is required to immediately consider the matter to find an appropriate solution.

Article 24 permits the application of safeguard measures in accordance with the WTO Agreement on Safeguards and the Agreement on Agriculture. In contrast to the four IEPAs discussed above the TDCA has a procedure (article 26) for the initiation and application of safeguard measures.

The provision for transitional safeguard measures is a crucial policy flexibility granted to South Africa under the TDCA. These measures are applicable only to South Africa and they address potential concerns that infant industries in South Africa may face serious difficulties caused by increased imports from the EC. The difference between article 25 of the TDCA and the four IEPAs is that the option under the TDCA is available to one Party, that is South Africa, whereas under the EPAs the EC also has a right to apply safeguard measures against imports from EPA signatories (bilateral safeguards). In this case, article 25 permits South Africa take exceptional measures of limited duration in the form of an increase or reintroduction of customs duties to protect infant industries. The measures may be applied for a period of four years over a 12 year period which is the transitional period. Significantly the TDCA leaves room for the time limits for the application of transitional safeguards to be extended. This provision is in contrast to the situation faced by other SADC countries in the EAC, ESA and Central Africa IEPAs where such crucial policy flexibility is not provided. The only coherence is between the TDCA (article 25) and the SADC EPA with respect to the application periods for safeguard measures and the possibility of the extension of such periods. Hence effectively the region's strongest economy has better terms for the protection of its industries than the rest of the SADC countries under the EAC, ESA and Central Africa EPAs which all include LDCs that require policy flexibilities to ensure the much needed industrial development and diversification as prescribed by the RISDP.

The TDCA creates more confusion with respect to the safeguard procedures for SADC EPA states, especially the SACU members. This is because article 24.3. provides for another procedure to be taken by South Africa on behalf of the SACU member states. Where any product is being imported in such quantities as to cause or threaten to cause serious deterioration in the economic situation of a SACU member state, South Africa may, at the request of that member state take surveillance or safeguard measures in accordance with the procedure in article 26 of the TDCA. The difficulty is in reconciling the procedures for safeguard measures under the SADC EPA and the TDCA, in particular where they relate to the SACU members. The difficulty is the creation of confusion on how best the rest of the SACU countries can deploy safeguard measures in the interests of their own industrial development due to a duplication and lack of coherence in procedures.

3.7.2 Treatment of quantitative restrictions

The 4 EPAs prohibit the maintenance or introduction of quantitative restrictions whether made through quotas, import or export licences or other measures. However this prohibition is without prejudice to the application of trade defense instruments. Further the SADC, ESA and EAC IEPAs make provision for exceptions allowing the application of quantitative restrictions as follows:

- The SADC IEPA (article 35) allows such restrictions if justified under the exceptions of article XI of GATT 1994;

- The ESA IEPA allows the restrictions as specified in Annexes I and II of the agreement, for example the temporary introduction of customs duties in exceptional circumstances;

- The EAC IEPA allows such restrictions on two conditions; export prohibitions temporarily applied to prevent or relieve critical food shortages and import and export restrictions necessary to the application of standards for the classification of commodities. These conditions are lifted from article XI of GATT 1994 though the EAC IEPA does not make use of all the exceptions under this article like the SADC EPA does.

The difference is with the Central Africa IEPA where article 22 thereof does not provide for any of the exceptions which the SADC, EAC and ESA IEPAs recognise. This is a limitation that even departs from the regional approach where for example, article 8 of the SADC Protocol prohibits the application of quantitative restrictions but goes on to provide for exceptional circumstances (article 9) where such restrictions may be applied.[22] The DRC is therefore the only SADC member which has no option to

[22] See too article 27 of the TDCA. In the case of South Africa it is important to note that although article 19 of the TDCA prohibits quantitative restrictions, the EC's decision to provide a duty free quota for South African wine to the current quota of 32 million litres is effectively a quantitative restriction. It may be possible to read the general exception clause in the Central Africa EPA that is article 89, as possibly covering the issue of exceptions to the prohibition of quantitative restrictions. It is however debateable whether this approach is correct.

apply quantitative restrictions within the context of the Central Africa EPA. It is important for the DRC to adopt a position which is in line with the rest of the region. Although all the other agreements have exceptions for the application of quantitative restrictions the SADC EPA is better in that it incorporates all the exceptions under article XI of GATT 1994.

3.7.3 Non-discrimination in fiscal matters and the regional industrial and fiscal policies

The four IEPAs require that products coming from the other Party should be treated like national products for internal taxation purposes. Further the IEPAs bar the Parties from applying internal quantitative regulations so as to afford protection to national production. However all the four IEPAs do not prevent the payment of subsidies exclusively to national producers. Apart from these similarities there are important differences in the provisions of the four IEPAs with respect to non-discrimination in fiscal matters.

- The ESA, EAC and Central Africa IEPA stipulate that the non-discrimination clauses do not apply to government procurement. The SADC IEPA is silent on this aspect;

- The ESA IEPA (article 18.6) gives the ESA countries the potential to depart from the non-discrimination clause in order to promote the establishment of domestic production and to protect infant industries. This is an important clause which also addresses the development needs of ESA states and, in particular, the special needs of the LDCs in the ESA group. For this purpose the ESA EPA produced a list of derogations granted to the signatory ESA States which derogations may be applied within stated time periods. This crucial policy flexibility in favour of development is not replicated in the SADC, EAC and Central Africa IEPAs. Hence the later are restricted from using internal taxation policies for the purposes of encouraging the establishment of domestic industries.

The differences in the use of fiscal laws to support industrial development are most likely to have a negative impact on the SADC wide plans for co-ordinated and harmonised fiscal and industrial regimes in pursuit of the common market agenda. For example, article 18 of Annex 1 of the PFI is an agreement by SADC States to pursue intra-regional industrial policies; variations in the application of tax laws in pursuit of industrial policy do not reflect a coordinated approach at the SADC level. Again such variations differ with the desire of the SADC States to co-ordinate their tax regimes as evidenced by Annex 3 of the PFI which provides for a regional approach to taxation and related matters.

3.7.4 Agricultural export subsidies

As noted above, all the four IEPAs do not prohibit the use of domestic subsidies to promote domestic producers. The WTO Agreement on Agriculture prohibits export subsidies on agricultural products unless the subsidies are specified in a member's lists of commitments. Where they are listed, the agreement requires WTO members to cut both the amount of money they spend on export subsidies

and the quantities of exports that receive subsidies. Export subsidies create distortions in the markets and have been subject to much criticism especially by developing countries that lack the financial muscle to subsidise their domestic producers for export purposes. The EC is one major user of these export subsidies.

However only the Central Africa IEPA deals with the issue of agricultural export subsidies. Article 24 of the Central Africa IEPA imposes a moratorium on new export subsidies and on an increase in existing export subsidies on agricultural products. Further, article 24 also requires the EC to dismantle all export subsidies on agricultural goods for which the Central Africa States have undertaken to reduce tariffs. In this case the Central Africa EPA mirrors the same provision in the CARIFORUM-EU EPA. Because the SADC, EAC and ESA EPAs do not deal with agricultural export subsidies the EC has no corresponding obligation to dismantle export subsidies on agricultural goods in these IEPAs.

The ESA and EAC IEPA positions are in stark contrast with the earlier position adopted by the ESA States in their draft EPA Text produced in 2006. The text recognised that the EU's Common Agricultural Policy distorts trade. Article 95 of the draft demanded that the EU eliminates export subsidies upon the entry into force of the EPA. The same clause further required the EU to make substantial reduction in domestic support measures although it did not give a timeframe for such reductions. In the end the EC's obligation to dismantle export subsidies only applies to one SADC country, the DRC which is under the Central Africa EPA; hence there is no regional coherence on the SADC side with respect to export subsidies in trade with the EU.

3.7.4.1 Subsidies under the SADC regional process and the TDCA; implications on regional integration

Article 19.1. of the SADC Protocol on Trade prohibits Member States from granting subsidies which distort or threaten to distort competition in the Region. Although not specifically mentioned in this provision, export subsidies are part of the general class of subsidies. This provision is a basic norm establishing a regional position with respect to intra-SADC trade policies and is an attempt at cementing the regional integration process.

The TDCA does not specifically prohibit or mention export subsidies. However Article 41 of the TDCA also provides that "public aid favouring certain firms or the production of certain goods, which distorts or threatens to distort competition, and which does not support a specific public policy objective or objectives of either Party, is incompatible with the proper functioning of this Agreement." This clause does not prohibit competition distorting public aid per se because of the extra condition that the aid should also be supportive of the public policy of either South Africa or the EC, in which case one can read this to mean that the clause has a limited effect on the EC's Common Agricultural Policy (CAP) since it is a public policy. However it is also useful to read this clause with article 19.2. which states that

it is in the interests of both Parties "to ensure that public aid is granted in a fair, equitable and transparent manner." Whilst there is a recognition under the TDCA that public aid can distort competition and affect trade between the EC and South Africa, the TDCA cannot be read as clearly prohibiting such subsidies as article 19.1. of the SADC Protocol on Trade does, or even as requiring agricultural export subsidy elimination as article 24 of the Central Africa EPA does.

In short the TDCA and the SADC, EAC and ESA IEPAs contradict the position which SADC States adopted on subsidies for purposes of intra-SADC trade. This has negative implications for the SADC regional integration agenda, in particular, the full implementation of the SADC Protocol on Trade. This is because the EC is required to dismantle export subsidies under the Central Africa configuration EPA but is not required to do so under the rest of the configurations of which SADC countries are members. Effectively this amounts to a privilege or concession given to the EC to export into the rest of the SADC countries on the back of export subsidies which would otherwise be prohibited in the DRC as a member of the Central Africa configuration. In this case the MFN clause in the SADC Protocol on Trade would require that the treatment granted to EC export subsidies on products entering the rest of the SADC countries be extended to the DRC thus potentially undermining the whole purpose of article 19.1 of the Protocol which prohibits the application of trade distorting subsidies.

By not specifically dealing with the issue of trade distorting subsidies the SADC, EAC, ESA EPAs as well as the TDCA go against the principle under article 28 of the SADC Protocol on Trade which requires member states to avoid frustrating the objectives of the Protocol when concluding preferential trade arrangements with third countries. The implication is that the regional economic integration instrument does not take precedence on the question of export subsidies.

3.7.5 Co-operation on administrative matters

All the four IEPAs include clauses on special provisions on administrative cooperation for the implementation and control of the preferential treatment. One of the objectives of this cooperation is to combat irregularities and fraud in customs and related matters. However lack of cooperation in this regard may have a direct impact on market access for specific products affected by the alleged fraud or irregularities. All the four IEPAs allow the Party which has made a finding of a failure to provide administrative cooperation and or of irregularities or fraud to suspend the relevant preferential treatment of the products concerned. This is a wide ranging provision which has the potential to disrupt trade and has the negative effect of punishing producers/exporters on the basis of administrative issues which they may have absolutely no control of in the absence of fraud on the producer/exporter's part. Despite the general similarities with the provisions in all the IEPAs there is one fundamental difference between the SADC IEPA and the rest of the IEPAs.

The SADC IEPA allows the suspension of the preferential treatment on account of lack of cooperation in administrative issues only on exceptional circumstances. Article 29.5 of the SADC IEPA defines exceptional circumstances as those circumstances which have or might have a significant negative effect on a Party or an SADC EPA State if a relevant preferential treatment of the products concerned is to be continued. This requirement is an attempt at mitigating the potentially harmful application of the punitive clause. Unfortunately this clause is not in the EAC, ESA and Central Africa IEPAs. As such there is no requirement for exceptional circumstances to be present before the temporary suspension of the preferential treatment is exercised. This places the rest of the SADC at a disadvantage. In contrast there is no TDCA clause that invites punitive sanctions of the withdrawal of preferential treatment in the face of non-cooperation on administrative matters.

The differences again expose the lack of common and co-ordinated positions by SADC countries in their negotiations of international agreements when such co-ordinated positions are required by the Protocol on Trade. These incoherencies further undermine the regional integration process since they do not support the proper implementation of the main economic integration instrument.

3.7.6 Customs and Trade Facilitation

The SADC and Central Africa IEPAs make provision for the procedures to be adopted for customs and trade facilitation. On the other hand the ESA and the EAC IEPAs do not have chapters on this issue as these are areas being negotiated in the context of a comprehensive EPA for both configurations.

One of the objectives of article 37 of the SADC IEPA is to promote the harmonisation of customs legislation and procedures. This process has a direct influence on the type and substance of legislation which will have to be adopted by the SADC States. For example, article 38.2 provides that the conditions "as stipulated by the World Customs Organisation, will have to be met and in particular the relevant legislation and measures in this area will have to be implemented in the EC Party and the said SADC EPA States."

Both the SADC and Central Africa IEPAs also require that the customs legislation and procedures shall be based on the revised Kyoto Convention on the Simplification and Harmonisation of Customs Procedures.[23] Hence both the SADC and Central Africa countries have already made commitments on revising their customs legislation and procedures in line with the requirements of the IEPAs. The ESA and EAC countries have not made such commitments, and although they are expected to negotiate customs and trade facilitation it is by no means certain that they will adopt similar obligations to the SADC and Central Africa IEPAs. There are potentially negative implications for the SADC region's own customs and trade facilitation processes.

23. See articles 39, SADC IEPA and 35 Central Africa IEPA.

Articles 13 and 14 of the SADC Protocol on Trade require SADC countries to harmonise their customs and trade facilitation legislation and procedures. Hence there is a SADC wide agenda for the harmonisation of legislation and procedures on this subject. This was agreed to before the signing of the IEPAs. There are asymmetries in the fact that some SADC countries have already assumed obligations for harmonisation of their laws with the EC under a different trading regime whilst others have not yet done so. There is no synchronisation of the process under the SADC Protocol on Trade and those under the IEPAs with respect to customs and trade facilitation reforms. The harmonisation process under the IEPAs is competing with the SADC wide process in this respect and this does not enhance the regional integration agenda.

3.7.7 Technical barriers to trade and SPS measures; and WTO obligations

Chapter 8 (SADC IEPA) and Chapter 4 (Central Africa IEPA) address the issues of technical barriers to trade (TBTs) and Sanitary and Phytosanitary (SPS) measures. It is important to note that both IEPAs confirm that the issue of TBTs and SPS measurers will be informed and governed by the rights of the Parties under the WTO agreements, that are the Agreement on Technical Barriers to Trade and the SPS Agreement. However, curiously the Central Africa IEPA under article 41 requires Parties which are not members of the WTO to assume the obligations under these two WTO agreements. This is in sharp contrast with article 65 of the ESA IEPA which acknowledges that some ESA States are not WTO members and that reference to the WTO agreements is not to be construed as imposing WTO obligations of non-WTO ESA member states. The ESA IEPA is clear that any inconsistencies between the IEPA and the WTO agreements should result in precedence being given to the IEPA in the case of those ESA States which are not members of the WTO. It is not apparent why the Central Africa IEPA departs from this practical position.

Although the EAC and ESA configurations are yet to produce a chapter on TBTs and SPS measures as these are part of the on-going negotiations for a comprehensive EPA, the treatment of TBTs and SPS measures is one aspect of the EPAs which may assist in achieving a positive result for the regional integration process in the SADC region. Articles 16 and 17 of the SADC Protocol on Trade commit the SADC countries towards implementing their obligations on TBTs and SPS measures in accordance with international standards which include the WTO agreements. Further article 47 of the TDCA promotes the use of the TBT Agreement for the purpose of standardisation and conformity assessment. The provisions of the SADC and Central Africa IEPA as well as the TDCA advance the existing SADC wide agenda for the adoption of common and international standards within the context of the TBT and SPS agreements at the WTO level. This is a positive aspect which will be enhanced if the EAC and ESA configurations also adopt similar chapters and within a timeframe that allows for regional synchronisation of the process. The only potential problem is that reference to the WTO agreements should also consider the practicalities of the current WTO negotiations which have stalled under an

unfinished work programme which also is relevant to the implementation of rules on TBTs and SPS measures.

3.7.8 Current payments liberalisation

The liberalisation of current payments (flows of funds relating to trade in products and services) is not treated the same in the IEPAs involving the SADC countries. Article 65.1 of the SADC IEPA liberalises current payments with the extra policy option for the SADC EPA States to take necessary measures to ensure that this liberalisation is not used by their residents to make unauthorised capital flows. In this case the SADC EPA States and the EC undertook to impose no restrictions and to allow payments for current transactions between their residents to be made in freely convertible currency. The SADC IEPA also makes provision for safeguard measures (article 66) which can be taken in exceptional circumstances where payments and capital movements between the Parties cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy. Such measures may be applied of a period not exceeding six months and a time schedule for their removal should be adopted. Article 56 of the Central Africa IEPA commits the Parties to negotiations on current payments and the movement of capital according to the following issues:

- Liberalisation of current payments;

- Liberalisation of movement of capital relating to investments including repatriation of investments and profits;

- A safeguard clause, granting a short-term derogation from freedom of capital movements, on grounds of serious difficulties as regards monetary situation or balance of payments; and

- A development clause, providing for the liberalisation of other types of capital movements not related to investment.

The inclusion of the possibility of a development clause will make the Central Africa IEPA potentially wider than the relevant provisions in the SADC IEPA. The TDCA (article 33) addresses transactions on the capital account and under this clause South Africa and the EC agreed that capital relating to direct investments in South Africa can move freely. However the EC and South Africa also agreed that they would consult each other with a view to facilitating the full liberalisation of the movement of capital between their respective economies. Article 34 also provides for a safeguard clause to be applied during serious balance of payments difficulties which should be for a limited period (with a timetable for elimination) in accordance with the GATT 1994 and Article VIII and XIV of the Articles of Agreement of the International Monetary Fund.

3.7.8.1 Linkages with regional integration issues around capital movements

There is no provision for liberalisation of current payments in both the ESA and EAC IEPAs although both texts have identified investment as an area for the on-going negotiations. This does not necessarily mean that there will be convergence with the SADC IEPA the TDCA or the intended outcome of the on-going negotiations on current payments liberalisation under the Central Africa IEPA. Hence there is no regional coherence on the issue in the context of SADC-EU trade relations. It is not also clear how the regional plans on the liberalisation of capital movements under the SADC wide process will relate to the current and proposed situation with the EC. It is important to assess how these processes affect the SADC wide plans under the SADC Protocol on Finance and Investment and the RISDP.

Target 6 of the RISDP includes liberalising exchange controls; current account transactions between Member States by 2006 and the capital account by 2010. This is a clear target with a specific timeframe. On the other hand article 15 of Annex 1 (Cooperation on Investment) of the FIP provides as follows:

> "1. State parties shall encourage the free movement of capital.
>
> 2. Notwithstanding the provisions of paragraph 1, State Parties may regulate capital movements subject to their domestic laws and regulations, when necessitated by economic constraints.
>
> 3. State Parties that introduce new regulations in the circumstances described in paragraph 2 shall notify the Secretariat for information purposes within a period of three (3) months of introducing such regulations."

It should be noted that the FIP also has special consideration for the plight of the LDC members of the SADC and as such permits under article 20, derogations for LDCs based on the principles of non-reciprocity and mutual benefit.

Before considering the linkages between the SADC plans for movement of capital with the IEPAs and the TDCA it important to note the inconsistencies between the RISDP and the FIP with regards to the timelines and the substantive aspects of the liberalisation of the movement of capital. The RISDP sets clear targets, one which has already been missed (the liberalisation of current account transactions in 2006), and the other which may be missed (the liberalisation of the capital account in 2010). On the other hand the FIP has no specific timeframe for the liberalisation of the movement of capital within the SADC region. Further article 15 of Annex 1 of the FIP does not read like a commitment to liberalise current account transactions or movement of capital, it speaks of encouraging the free movement of capital, it is at best, a best-endeavour clause which does not set an obligation on member states to take measures for the liberalisation of the movement of capital.

The problem which emerges from this analysis is that the liberalisation of capital movements or current payments under the SADC EPA, the TDCA, and as planned for negotiation under the Central Africa EPA look more concrete than the SADC wide plans and the FIP. It is very well possible that the EPA process will take precedence over the SADC plans as the later are not properly defined for purposes of implementation.

Further, in both the SADC EPA and the TDCA the threshold for the suspension of the commitments on capital movement is more stringent than that envisaged under the PFI. The FIP allows flexibilities on regulations on the movement of capital on the basis of economic constraints. There is no requirement that regulatory changes made in this context which suspend the free movement of capital should be of a temporary nature, and finally the FIP would give SADC LDCs more flexibilities in the form of derogations that include limitations on the movement of capital. This is the complete opposite of what is provided for under the SADC IEPA, the TDCA, and what is planned for negotiation under the Central Africa EPA (although the later promises a development section). There are more stringent requirements for those SADC countries that have made a commitment for liberalisation under their relations with the EC. It is difficult to see how one set of rules on the movement of capital can co-exist with another (the rules on trade with the EC and those stemming from the FIP) in the same economy.

Although noting that the regional framework for the liberalisation of capital movements has a poor implementation structure it should be emphasised that there are substantive flexibilities in the regional framework which were created in order to take into account the economic differences in the SADC membership, and these flexibilities are undermined in the EPA negotiations by the adoption of more stringent requirements for capital account liberalisation.

3.7.8.1.1 The OHADA reforms and the DR Congo

The divergences noted above are likely to be made worse by the position of the DRC. In 2006 the DRC government[24] announced that it would join the Organisation for the Harmonisation of Business Law in Africa (OHADA) which is a group of 16 Central Africa states intent on adopting a harmonised legal regime for the conduct of business operations. The decision by the DRC government will also have profound changes on its regulatory environment relating to business, fiscal and investment matters. This is another harmonisation exercise which is running on different terms with that envisaged under the FIP and the SADC Protocol on Trade. Notably, article 6 of the Central Africa EPA commits the Central

24. Through the February 10, 2006 presidential statement and Council of Ministers decision, the DRC announced its intention to formally join OHADA. This organization currently has 16 member countries: Benin, Burkina Faso, Cameroon, Comoros, Congo, Côte d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, CAR, Senegal, Chad, and Togo. The DRC will be its 17th Member State. See further, J. Isern and others, A Policy Diagnostic on Access to Finance in the DRC, April 2007, available at http://www.cgap.org/gm/document-1.9.5070/diagnostic_Congo.pdf

Africa States which are signatories to OHADA to implementing this treaty. This adds to the complication of achieving any regional plan for a common position on the movement of capital in the SADC region.

3.7.9 Development cooperation

The development aspect of the EPAs has been one of the most controversial parts of the negotiations. The ACP group has been keen to emphasise that the liberalisation process in their markets should be compensated for by a commitment from the EC to avail funds and other forms of assistance in order to set off the losses occasioned by liberalisation and also to improve upon the ACP group's supply side constraints. For the SADC region to move with its development plans it is reasonable to expect some sort of convergence in the development aspect of the IEPAs which were signed by the four configurations under which the SADC countries fall. The question is what commitments if any did the EC make with respect to the individual IEPAs development aspects and how these are to be implemented? Because of the significance of the development aspect of the EPAs for the SADC countries it is important to provide in detail what each IEPA provides for before assessing whether the provisions have any impact on regional integration plans. Table 10 below summarises the issues on development in each of the IEPA and also makes reference to the relevant articles under the TDCA for purposes of comparison.

Table 10: Development in the SADC, ESA, EAC, Central Africa EPAs and the TDCA[25]

Subject	SADC EPA	ESA EPA	Central Africa EPA	EAC EPA	TDCA
Overall commitment	The Parties commit themselves to cooperating in order to implement this Agreement and to support the SADC EPA States' trade and development strategies within the overall SADC regional integration process. The cooperation can take financial and non-financial forms.	The Parties agree to address the development needs of the ESA States in order to promote sustained growth in the ESA region, increase production and supply capacity of the States concerned. Foster structural transformation and competitiveness of their economies and their diversification and value addition and support regional integration. (art.36)	The parties affirm their commitment to promote capacity building and economic modernisation in Central Africa using the various instruments at their disposal, for example by setting up an economic and institutional framework at national and regional levels that is conducive to the growth in economic activity in Central Africa, by means of trade policy instruments and development cooperation instruments as set out in Article 7. (art.4)	The Parties agree to work together to define and address the development needs associated with the EPA in order to promote sustained growth, strengthen regional integration and foster structural transformation and competitiveness to increase production, supply capacity and value addition of the countries concerned. (art. 36)	Development cooperation shall contribute to South Africa's harmonious and sustainable economic and social development and to its insertion into the world economy...(art.65)

[25] The TDCA has two chapters which are relevant to the discussion, Title IV on economic cooperation and Title V on development cooperation. The earlier speaks of an interest to develop the rest of Southern Africa (see art.50 of the TDCA), however it is the later which has more specific commitments, hence we dwell on this part of the TDCA.

Development finance cooperation	Development finance cooperation for regional economic cooperation and integration shall be carried out so as to support and promote the efforts of the SADC EPA States to achieve the objectives and to maximise the benefits of this Agreement.	The Parties commit themselves to cooperating in order to facilitate the implementation of this Agreement and to support regional integration development strategies. The Parties agree that cooperation will be based on the ESA Development Cooperation Strategy and the jointly agreed Development Matrix...The cooperation shall be in the form of financial and non financial support to the ESA region.(art.36.2.)	The Parties recognise the usefulness of specific regional financing mechanisms which support the implementation of this Agreement, and will support the region's efforts in this direction. (art7.5)	Not yet developed, part of the rendezvous clause.	
Mode of delivery	The Parties agree that a regional development financing mechanism such as an EPA fund would provide a useful instrument for effectively channelling development financial resources and for implementing EPA accompanying measures. The EC Party agrees to support the efforts of the region to set up such a mechanism. The EC Party will contribute to the fund following a satisfactory audit.	Sufficient resources should be mobilised on a predictable, timely and sustainable basis including through grants and concessional loans based on the Development Matrix. (art.36.5) The Parties shall, in that regard, support the establishment of an EPA Fund to channel EPA related resources. (art.36.6)	The Parties agree on the creation an EPA regional fund...the detailed rules for the operation and management of the EPA regional fund shall be decided by the region by the end of 2008.	Not yet developed, part of the rendezvous clause.	Multiannual indicative programming based on specific objectives derived from the priorities in article 66 and indicating modalities for the preparation, implementation and monitoring of the development cooperation and resulting operations during a reference period shall be carried out in the context of close contacts between the community and the South African Government with the contribution of the European Investment Bank. (art.69)

Coverage	Trade in goods, supply side competitiveness, business enhancing infrastructure, trade in services, trade related issues, trade data, institutional capacity building, fiscal adjustment.	Private sector development, infrastructure development, natural resources and environment, agriculture, fisheries, services (including tourism) trade related issues (investment, competition, intellectual property rights, standards, trade facilitation and statistics.	Development of basic regional infrastructure, agriculture, industry, diversification and competitiveness of economies, strengthening regional integration, improvement of the business environment.	Not yet fully developed, part of the rendezvous clause. But see for example aspects of cooperation in the agreement, especially articles 25-36 on fisheries.	Support for policies and instruments towards the progressive integration of the South African economy into the world economy and trade, for expansion of employment, for development of sustainable private enterprises, for regional cooperation and integration. In this context, special attention will be given to providing support to the adjustment efforts occasioned in the region by the establishment of the free trade area under this Agreement, especially SACU.

Source: developed by author from the SADC, EAC, ESA, Central Africa EPAs and the TDCA (the emphasis is by the author).

3.7.9.1 The regional component

Although there is a reference to regional integration in the development cooperation sections of the IEPAs (with the exception of the EAC EPA), it is clear that the reference relate to the regions is as per the EPA configurations, not the existing RECs. For example article 36 of the ESA IEPA speaks of development cooperation for the purposes of promoting sustained growth in the "ESA region". The proposed channelling of resources to suite the particular configurations does not enhance the regional integration programmes of the RECs because it is specific to the EPA configurations, and not the existing RECs and their regional integration goals as stated in such instruments as the SADC Protocol on Trade and relevant economic integration targets under the RISDP.

3.7.9.2 Divergences and convergences in levels of commitments

As shown in the above table, there is no similarity in the development aspects of the EPAs. In the SADC IEPA the Parties did not agree that there must be financial contributions from the EC, rather there was a commitment that the EC's contribution can take financial or non-financial forms. This is not an obligation on the part of the EC; the EC has an option of deciding whether or not to make a financial contribution. Further the vehicle through which such contributions will be delivered was not agreed

upon, rather an EPA Fund was suggested just as an example. It is far from clear when the EC will make a financial contribution to support the SADC EPA States' development needs, the SADC EPA says this will happen after a satisfactory audit without clarifying what audit this is about. Whilst there is some coverage of the areas for intervention, there is no clear list of what the EC funds, if and when received will be used for in the development context of the SADC EPA States.

In contrast the ESA EPA clearly stipulates that the EC' contribution shall be in the form of financial and non-financial support. This support is to be channelled through the EPA Fund for which establishment the EC is obliged to support. Article 36.5 of the ESA IEPA also ties the EC to commitments on timely and sufficient delivery of funds to be expended on a clear list of development programmes as contained in the Development Matrix. The matrix is a multi-sectoral supply-side intervention to boost the ESA States' productive capacity. This matrix is detailed and comprehensive enough to serve as a programmatic template for long term intervention in the ESA economies. This makes the ESA IEPA unique and practical in this context.

The Central Africa IEPA contains an obligation for the EC to support the setting up of an EPA regional fund although the actual mechanisms for its operations are yet to be agreed upon. The TDCA also has commitment from the EC based on the multiannual indicative programming based on specific objectives derived from the priorities in article 66.

In terms of concrete indicators and obligations for development cooperation the ESA IEPA and the TDCA are the more clear, transparent and predictable. The ESA IEPA and the TDCA spell out the obligations of the EC with respect to development finance cooperation, this is a positive aspect which the SADC and Central Africa fail to do, and which is hoped the EAC EPA can achieve as part of the on-going negotiations for a comprehensive EPA. Whilst it is acknowledged that the ESA EPA and the TDCA show concrete examples of the nature of the EC' obligations, the mode of delivery, and the benchmarks expected to ensure that the development aspects of both agreements are implemented there is no regional convergence on the development aspects of trade with the EU because the rest of the SADC region has not developed such clear frameworks. In some SADC countries the EC' obligations are enforceable on account of clear legal language in the IEPA or TDCA, and in some countries they are not enforceable on account of a lack of obligations/commitments in the IEPAs. There is a clear potential for a mismatch in the delivery of EC adjustment funds under the development aspects of the EPAs due to the differences in the EC' obligations under the four EPA configurations. This is unfortunate as the SADC countries as part of the ACP group have argued that the development aspect of the EPAs is the most important issue. There is no attempt in the IEPAs to tie in the different development funding mechanisms in order to achieve regional coherence and harmonisation with the existing SADC-wide regional integration process.

3.7.10 Status of existing RECs in the EPAs; impact of the IEPAs

All the IEPAs state that they will promote regional integration. For example the SADC IEPA states (under article 4) that regional integration is an integral element and a powerful instrument to achieve the objectives of the Agreement. It further adds:

"The Parties support in particular the integration processes and related development policies and political agendas, based on the Southern African Customs Union Agreement signed on 21 October 2002, the Southern African Development Community Treaty signed on 17 August 1992 and the Constitutive Act of the African Union adopted on 11 July 2000. They aim at building and deepening their partnership on the basis of those processes and at implementing this agreement in a mutually supportive manner with those instruments, taking into account the respective levels of development, needs, geographical realities and sustainable development strategies."

However throughout the SADC IEPA there is hardly any reference in substance to the SADC as an organisation or its Secretariat.

Clear recognition of the substantive role in the EPA negotiations of the existing formal RECs to which SADC countries belong is a good indicator that the EPAs will have a positive effect on the regional integration process. For this to be a practical reality and not simply a statement in the IEPAs there should be very precise clauses on the substance of what and how exactly existing RECs such as SADC, COMESA and the EAC are expected to do in the EPAs process. Further there should not only be clauses with stipulations for the obligations and privileges of the member states of the RECs but also the role of the secretariats of the RECs should be apparent if not obvious. This is because it is difficult to imagine how the EPAs can promote regional integration if the existing regional integration institutions are not given legal recognition for the purposes of implementing and negotiating the EPAs.

Table 11: Status of the RECs in the IEPAs

Subject	SADC IEPA	ESA IEPA	EAC IEPA	Central Africa EPA
Definition of "Parties"	The Agreement defines the contracting parties as the countries that signed the agreement; these are collectively referred to as the SADC EPA States. The SADC Secretariat is not even a depository of the agreement as other RECs secretariats are, instead the depository is the Secretary-General of the Council of the European Union.	The Agreement defines the contracting parties as the countries that signed the IEPA, which are referred to as "ESA States", the later which is not a REC (art.61). The role of COMESA to which all the signatories belong to is not mentioned. COMESA is only mentioned as a depository of the agreement.	The agreement speaks of EAC Partner States and not the EAC or the EAC Secretariat. Article 44 defines the EAC Party as the individual EAC countries and not the EAC. Article 44 further provides that the EAC Partner States agree to act collectively but this collective action is not centred on the role of the EAC, it is not mentioned with respect to this agreement.	The Agreement does not recognise either CEMAC or CEEAC but speaks of Cameroon as the other Party. Although also providing for collective action on the part of the Central Africa States this collective is not based on any existing REC.
Composition of EPA Council or implementing body	A Joint SADC EPA States-EC Council is created under art.93. Representation is not based on the SADC membership but on that of the SADC EPA States. There is no provision for the attendance of the SADC Secretariat at meetings of the Joint Council.	The Council is to be composed of representatives of the Parties and each Party determines the organisation of its representation. No mention is made of COMESA or its Secretariat. There is no provision for the observer status of the COMESA Secretariat.	The Council is to be composed of representatives of the Parties and each Party determines the organisation of its representation. No mention is made of the EAC or its Secretariat. There is no provision for the observer status of the EAC Secretariat.	CEMAC or CEEAC are not mentioned in the composition of the Council. However article 93 provides that CEMAC and the General Secretariat of the CEEAC shall be invited to attend all meetings of the EPA Committee.

Source: compiled by from the SADC, EAC, ESA and Central Africa IEPAs.

Whilst the EAC IEPA is the only one which includes all the members of the EAC as signatories the EAC itself is not given any recognition as the institutional mechanism through which the EPA is implemented or negotiated. In other words there is no deliberate linkage with the EAC regional integration process and the EPA process. The EAC Secretariat is only mentioned as a depository of the IEPA as are the other secretariats of the RECs with the exception of the SADC Secretariat which is not even given this depository role. The best status granted to existing RECs under the 4 IEPAs is that of being invited to EPA Council meetings and that relates to CEMAC and CEEAC under the Central Africa IEPA. However all CEMAC and CEEAC are entitled to is an invitation to attend meetings, nothing in the Central Africa IEPA suggests that they can do more than just attend the meeting. The worst status is granted to the SADC Secretariat which is not even mentioned. Taken together all the IEPAs have virtually no role for the existing institutional REC mechanisms the later which are effectively deemed irrelevant. What all the

IEPAs achieve is to simply supplant the existing RECs with ill-defined new institutional arrangements to push an agenda under the IEPAs without at all taking into account how this will operate in practice and beyond the existing RECs.

The effect is that the RECs such as SADC have been rendered institutionally irrelevant in the EPAs process but ironically as in other RECs member states utilise the technical expertise in these RECs for the purposes of assisting national officials as they negotiate with the EC.

3.7.11. Conclusion

Consideration of the actual content of the four IEPAs shows significant areas of divergences, this when taken into account with the relevant provisions under the TDCA shows very little substantive convergences with respect to the SADC countries' positions in the trade relations with the EU. The differences are not limited to a lack of a regionally coherent SADC-EU trade policy but they go to the core of the SADC regional integration process itself. In other words the substantive aspect of the IEPAs will further widen the gaps already inherent in the SADC regional integration process. In some instances mentioned above, some of the IEPA provisions actually contradict existing provisions in the SADC Protocol on Trade. In some instances the IEPAs expose the inconsistencies between SADC regional integration instruments, such as the tensions between the RISDP and the PFI with respect to the liberalisation of the movement of capital.

The biggest obstacle thrown by the IEPAs is the complete marginalisation of the existing RECs, and particularly the Secretariats of these RECs, in this context SADC comes out the worst affected institution.

IV. Trade-related Issues and the On-going Negotiations for Comprehensive EPAs

4.1 Areas for further negotiations

The four IEPAs made provision for the continuation of negotiations for comprehensive or full EPAs based on the conclusion of issues raised with respect to trade in goods and trade related issues forming the new areas for negotiation. The rendezvous clauses in the IEPAs define the outstanding issues for negotiation as well as the timeframes for the completion of the negotiation processes. Table 12 below shows the scope of the outstanding issues which were agreed upon as areas for further negotiation under the 4 IEPAs involving SADC countries. It is important to examine the areas for further negotiation and to assess how the process impacts upon the SADC regional integration agenda.

Table 12. IEPAS scope of areas for further negotiations

SADC EPA	ESA EPA	EAC EPA	Central Africa EPA
Trade in services Cooperation in services investment	Trade in services Customs and trade facilitation Trade related issues (competition policy, investment and private sector development, trade, environment and sustainable development, intellectual property rights, transparency in public procurement) Outstanding trade and market access issues including rules of origin, trade defencse measures and outermost regions	Trade in services Customs and trade facilitation Trade related issues (competition policy, investment and private sector development, trade, environment and sustainable development, intellectual property rights, transparency in government procurement) Outstanding trade and market access issues including rules of origin,	Current payments and capital movements Competition Intellectural property Public procurement Sustainable development

	TBTs and SPS measures Agriculture Current payments and capital payments Development issues Cooperation and dialogue ongood governance in the tax and judicial area An elaborate dispute settlement mechanism	TBTs and SPS measures Agriculture An elaborate dispute settlement mechanisms Economic and development cooperation Any other areas	

NB colour coding shows broad similarities in coverage

The broad descriptions in Table 12 above show that there are common areas for future negotiations as well as differences, and as discussed below, the differences vary from minor to major. Some issues under negotiation in the second phase in one configuration were covered in the first phase in another configuration, in this context there is both an opportunity for coherence with the later configuration catching up and a risk of incoherence if the later configuration negotiates different outcomes. For example the ESA configuration is negotiating trade defence instruments in the second phase when other configurations deal with this issue in the first stage of the negotiations.

4.2 Alterations in the configurations and lack of regional coherence

The SADC EPA group has split for the second stage of the negotiations. The group only consists of Botswana, Lesotho, Mozambique and Swaziland. Angola, Namibia and South Africa opted out of this stage citing several concerns which will be discussed further below. The Central Africa EPA process is also problematic in that only Cameroon signed the IEPA. Although there are areas for further negotiations under the Central Africa IEPA there has been no movement in the implementation of the IEPA by Cameroon. This is partly because there is still need to bring on board the rest of the Central Africa EPA States and produce a regional approach to the process. Hence even before the substantive aspect of the second stage of the negotiations is discussed it is important to note that there is no SADC regional consensus on this process and its content. Some SADC states are negotiating with the EC in various configurations in the second stage and some (Angola, DRC, Namibia and South Africa) are not involved in this process.

The result will be serious disparities in the nature of commitments made by SADC countries especially in the negotiations involving the so-called new generation issues (e.g. competition, investment, public procurement and new disciplines on services) with a direct impact on the current regional integration processes where common positions are expected to enhance the common market vision. Some SADC countries will make commitments on the new generation issues and others will not, and further, even for those who will make such commitments there are clear expected disparities on the scope and extend of the commitments as will be discussed below.

4.2.1 Differences within the SADC EPA group

The split in the SADC EPA group with respect to the new generation issues occurred for a number of reasons including the lack of preparedness of the SADC EPA group to handle these negotiations. The initial SADC EPA group position was against negotiating such issues. The objections to these negotiations were best captured by the position taken by South Africa as in the box insert below.

Box 6: Position of the South African Government on the new generation issues

Our opposition to including these issues in the EPA was spelled out in the original Framework Document agreed by the SADC EPA Group. First, there is no compulsion to negotiate the so-called new generation trade issues under the EPA to meet the requirements of WTO compatibility. Neither the Cotonou Agreement nor the TDCA contain any obligation in these areas. Second, some new generation trade issues are currently under negotiation in the WTO (services, IP, and environment), while others have been excluded (investment, competition, procurement, labour). Third, SADC EPA Member States have limited institutional and negotiating capacity, which would be severely strained if these issues were to be negotiated under the EPA. Further, new generation trade issues would pose serious policy challenges as SADC has no common policies in these areas. Negotiating these subjects under such conditions runs the risk of delivering unbalanced outcomes that may be prejudicial and limit national developmental objectives and policy space, and outcomes may foreclose prospects for deeper integration in SADC and SACU. Fourth, outcomes could result in obligations that go beyond those agreed in the WTO (WTO-plus), and introduce into the bilateral context, issues that contributed to the failures of Cancun (investment, competition and government procurement) and of Seattle (labour and environment). Moreover, by negotiating these issues bilaterally, SADC EPA Member States would be complicit in bypassing WTO negotiations or prejudging its negotiating positions in the Doha round in areas of services, IPR protection, and environment where multilateral negotiations are ongoing.

Our approach was that SADC EPA Member States would be prepared to engage these issues in an appropriate framework. This framework should focus on technical exchange and cooperation where the EU could assist in the development of SADC institutional, policy and legislative infrastructure. This may extend to the development of common policies in SADC to foster regional integration. In recognizing that these issues are important dimensions of economic governance, SADC EPA Member States propose a cooperative engagement with the EU. Such cooperative arrangements would not extend to negotiations nor involve any substantive obligations. Furthermore, we argued that any final agreement in these areas would not be subject to dispute settlement under the EPA.

Other SADC EPA members shifted position on these issues. Initially, the SADC EPA Members, except Namibia and South Africa, indicated that they would consider committing to negotiate only in services so long as they received adequate technical assistance. In the final negotiations, under considerable pressure, these Members committed to immediately enter negotiations in services and investment without any binding upfront commitment for technical assistance from the EC, and they committed to negotiate competition and government procurement in future.

Source: Government of South Africa (2008)[26]

Whilst some of the above objections relate to the SADC EPA group, some of them such as the conflict between the WTO commitments and the WTO-plus facet of the EPA negotiations on new generation issues apply to the rest of the SADC countries negotiating in the other configurations. This reinforces the fact that no specific SADC wide position was articulated or adopted before the SADC countries made commitments to negotiate new generation issues in their respective EPA configurations. The decision to engage the EC on these issues has widened the rifts in the SADC integration agenda as some members are directly opposed to this engagement. This difference is compounded by the type of commitments made by the SADC countries as discussed below. Due to the fact that negotiations for the full EPAs are on-going there are no specific positions so far adopted, and in some regions negotiations are text based whilst elsewhere discussions have not produced any formal documents which are publicly available, this section of the report will make use of various documents which indicate the state of affairs. For example use of the CARIFIORUM EPA is made as it is the example of a full EPA which can be utilised as material for possible outcomes in the second phase of negotiations on trade-related issues which the SADC countries are currently engaged in but at varying stages of the process.

[26] Government of South Africa, Department of Trade and Industry, SADC EPA Group-EC Negotiations: assessing the Emerging Outcome, 30 January 2008, Pretoria, available at http://www.dti.gov.za/parlimentary/EPAoutcomes.pdf

4.3 Trade in services

4.3.1 Commitments made in the IEPAs

Both the ESA and EAC IEPAs state that the process for the conclusion of a full EPA will include negotiations on trade in services (articles 53 and 37 respectively). No other detail is provided on this process. On the other hand the Central Africa IEPA provides that not later than 1 January 2009 the scope of the agreement would be extended by "negotiating the necessary provisions for the gradual, asymmetrical and reciprocal liberalisation of establishment and trade in services." The SADC IEPA is more detailed and provides that not later than December 2008, the Parties will complete negotiations on services liberalisation on the basis of the following:

- a liberalisation schedule for one service sector for each participating SADC EPA State;

- a commitment to a standstill as specified in article V(1)(b)(ii) GATS, for all services sectors; and

- an agreement to negotiate progressive liberalisation with substantial sectoral coverage within a period of three years following the conclusion of a full EPA.

The clearest commitment on the specific aspects of the on-going negotiations in services is with respect to the SADC IEPA. The SADC EPA States have committed themselves to negotiating progressive liberalisation with substantial sectoral coverage within three years following the conclusion of the full EPA. For the rest of the IEPAs it is not clear what positions were adopted upon signing the IEPAs apart from simply stating that services are part of the on-going negotiations for a full EPA. Hence it is important to note that from the very onset the SADC countries have not adopted a common position on the process and substance and the extent of liberalisation on trade in services in the context of the EPAs. This point should also be considered in view of South Africa's current commitments on services liberalisation under the TDCA.

4.3.2 Commitments made under the TDCA.

Article 29 of the TDCA is a commitment to strictly observe the GATS, in particular, its MFN principle. However the TDCA excludes the application of the MFN treatment from applying to:

- advantages accorded by either Party under the provisions of an agreement as defined in Article V of the GATS or under measures adopted on the basis of such an agreement; and

- other advantages accorded pursuant to the list of MFN exemptions annexed by either Party to the GATS.

Under the TDCA South Africa and the EC agreed under article 30 to "endeavour to extend the scope of the Agreement with a view to further liberalising trade in services between the Parties." It is important to note that this agreement is further qualified by the words "In the event of such an extension, the liberalisation process shall provide for the absence or elimination of substantially all discrimination between the Parties in the services sectors covered and should cover all modes of supply."

4.3.3 Implications on regional integration in trade in services

The level of commitments made by South Africa under the TDCA and that made by the SADC EPA States under the SADC IEPA is different. The SADC EPA States made a definite commitment to liberalise one service sector each by 31st December 2008 (though this date has elapsed the commitment still remains), they further made a commitment to negotiate progressive liberalisation with substantial sectoral coverage within a period of three years from the date of the full EPA. Although they did not agree to much in detail the rest of the SADC countries under the rest of the IEPAs also made a commitment to negotiate the liberalisation of services with the EC. On the other hand South Africa made no such commitments. The TDCA does not have an obligation for South Africa to negotiate the liberalisation of services because article 30 thereof is clearly worded as a best endeavour clause that does not impose such an obligation. There is no timeframe given for this best endeavour clause, all the TDCA does is to acknowledge the possibility that services may be negotiated, the phrase "In the event of such an extension.." is a clear statement showing that Parties considered services liberalisation as a possibility and not a must.

Hence the rest of the SADC region (except for Angola, Namibia, and the DRC (because the later has not signed up to the Central Africa IEPA) has adopted obligations that differ amongst themselves and also with South Africa in respect of trade in services under the trade relations with the EC. They have also signed up to a liberalisation process that is not informed by the regional plans to liberalise services within the SADC group in the context of article 23 of the Protocol on Trade which provides that the "member states shall adopt policies and implement measures in accordance with their obligations in terms of the WTO's General Agreement on Trade in services (GATS), with a view to liberalising their services sector within the community." Because article 23 of the Protocol has no clear modalities, including timeframes for intra-SADC services liberalisation the process under the SADC-wide agenda has already started to run way behind that involving some SADC countries and the EC. Further in the absence of a SADC-wide position on how to implement services liberalisation under the SADC integration process it is clear that precedence has been given to the process of services liberalisation with the EC, thus further complicating or even nullifying any possibility that such a regional process will be undertaken.

4.3.4 The SADC EPA States approach to the services negotiations

In September 2008 the SADC EPA States approved a framework for the services and investment negotiations under the second phase of the EPA process.[27] The framework commits SADC EPA states to:

- further clarify and improve the regulatory regimes on services towards greater predictability and transparency;
- enhance the regulatory, institutional and supply capacity necessary to maximise potential development benefits of services reforms;
- attract and benefit from foreign direct investment in services, consistent with the national development objectives;
- improve access to efficient services that reduce transaction costs, promote technology and skills transfer thereby facilitate production and trade and
- diversify the supply capacity of the economies, especially in areas of export interests in trade in services and other productive economic activities.

There is no reference to the desirability of linking the process with the regional integration process as way of resolving the problem of lack of real movement on services in the SADC region, or as another opportunity to align the SADC region's multilateral positions on services with the region's plans to liberalise services, particularly with respect to the free movement of natural persons.

4.3.5 The EC position on trade in services in the EPA context

The EC' position on trade in services in the EPAs context is based on an EC template developed in 2006.[28] The position is founded on the GATS principles (market access, national treatment and MFN treatment). This three-pillar structure is supplemented by general and final provisions, as well some regulatory provisions and provisions on e-commerce. Below is the EC's summary of the EC template which is useful for understanding the EC' approach in the current negotiations:

- A 'positive list approach' providing flexibility for each ACP country to specify a list of commitments covering establishment and cross-border supply of services, relevant to its own level of development and which reflect regional and national economic goals. The scheduling structure is more simplified as compared to the GATS (only two columns: one with the sectors committed and one with the limitations that apply for each of those sectors), so as to ensure transparency and clarity, facilitate the work of negotiators and to avoid the uncertainty surrounding Article XX.2 of the GATS.

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27. SADC EPA Framework for services and Investment Negotiations, 12 September 2008, SADC/EPA-MIN/14/2008/4.
28. See EC Proposal for a Title: Establishment, Trade in Services and E-Commerce.

- Most Favoured Nation (MFN) treatment clauses providing for asymmetrical obligations for the Parties and promoting regional integration. First, [EPA REGION] States will have to provide MFN treatment to the EU which is offered to major EU competitors (e.g. USA, Japan) and not treatment offered to other countries. Second, [EPA REGION] States the region can offer more favorable treatment between themselves as compared to treatment offered to the EC. Third, treatment provided by individual [EPA REGION] States to the EC shall automatically be extended to other [EPA REGION] States.

- For the temporary movement of natural persons for business purposes, the template provides for an automatic commitment for those categories that are linked to establishment or to cross border supply of services for each sector committed. This concerns business services sellers, key personnel and graduate trainees (a key category to ensure brain circulation between the EC and ACP countries). As regards key personnel and graduate trainees, it will be possible however to derogate to that automatic commitment for selected sectors by inscribing specific limitations in a negative list.

Concerning Mode 4 categories de-linked from a commercial presence (contractual services suppliers and independent professionals), their profile is raised.

Regarding investment-related issues, the EC proposal addresses only pro-development type investments (foreign direct investment will be covered, but portfolio investments will not be covered), through extending the GATS principles and flexibility regarding Mode 3 to establishment across all economic sectors.

- A specific provision in the chapter on the regulatory framework to capture specific priority areas for cooperation between the Parties, once this have been identified in the course of the negotiations.

- The Chapter on regulatory framework contains a number of regulatory principles in key sectors for development, such as telecommunications, financial services and maritime transport. These principles are based on GATS (existing and proposed) annexes, reference papers and from provisions of existing EU agreements. It also contains general provisions on transparency and procedures, inspired from the GATS, as well as a mechanism intended to facilitate the negotiations of agreements on the mutual recognition of professional qualifications.

What the above means in practise can best be explained by the provisions of the CARIFORUM-EC EPA.

4.3.6 CARIFORUM-EC EPA: trade in services[29]

[29.] See too http://trade.ec.europa.eu for a fuller summary.

The major features of the CARIFORUM EPA are as follows:

- The liberalisation of services in the CARIFORUM EPA is not done in a uniform manner. The Parties agreed to open up specific sectors under annex 4 of the Agreement and permitted special conditions and limitations for example, special reservations for SMEs in certain sectors.

- An attempt at recognising the differences in economic development between the EC and the CARIFORUM countries is made through the asymmetrical liberalisation commitments where the EU commits to 94% of sectors and the CARIFORUM to 75%. There is also better treatment for LDCs who are permitted commitments in 65% of the sectors. However the agreement broadly covers all services sectors with the exception of maritime cabotage, aspects of air transport and audiovisual services and services supplied in the exercise of governmental authority. EU services commitments open the EU market to service suppliers and investors to supply cross-border services like international phone calls, banking or architectural services. This also includes contractual service suppliers and independent professionals e.g., tourist guides, artists and chefs de cuisine. Skilled self-employed service suppliers like legal advisory services, computer services and management consulting can also enter the EU for up to 6 months at a time.

- Although the EPA has an MFN clause this does not apply to regional agreements in the Caribbean but any advantage granted to the EU must also be granted to fellow CARIFORUM countries. Commitments made on the presence of natural persons are not covered by the MFN clause.

- There is no standstill provision.

- Regulatory principles are covered with respect to key services sectors e.g. computer services, courier services, telecommunications, financial services, maritime transport and tourism. The objective is to promote transparency in regulatory frameworks whilst leaving the Parties with the right to regulate and define such issues as universal services.

The SADC EPA States negotiating framework has potential to capture the essential aspects of the CARIFORUM EPA's substantive provisions on the liberalisation of trade in services. The box insert below shows the essential aspects of the SADC EPA States negotiating framework and guidelines for services liberalisation.

Box 7: SADC EPA negotiating principles for trade in services

Progressive and Asymmetrical Liberalization

The participating SADC EPA States affirm the position that was made at the all-ACP phase 1 of the EPA negotiations that services liberalization in an EPA should be progressive, based on a positive list, adapted to the development level of ACP countries taking into account their sectors and specific constraints, and underpinned by principles of special and differential treatment, asymmetry and positive regional discrimination. In line with the spirit of Cotonou, participating SADC EPA States expect the EC to grant them broader and deeper market access and national treatment than it would obtain.

To add value to an EPA, it is necessary that a GATS plus outcome be achieved. This should be cognizant of the level of development of the Parties, and in particular, the special circumstances of the least developed members (LDCs) and small and vulnerable economies (SVEs).

As a matter of principle, participating SADC EPA States will seek a significant improvement of the EC's initial and revised GATS offer. Under Article 41.3 of the Cotonou Agreement, the EC has undertaken to accommodate specific interests of the ACP States in its offer. To achieve this, it is necessary that the negotiation process is sequenced in a manner and at a pace that allows proper engagement of the participating SADC EPA States on the EC offer.

Universal Access Principle

Participating SADC EPA States affirm that access to basic services plays an important role in a country's economic development and poverty reduction. For this reason, general availability and provision of these services regardless of income level and geographic location is an important public policy objective. Therefore, universal access to basic services must be respected.

Development Support/Cooperation

Development cooperation in the context of the EPA should also aim at strengthening the capacity of the participating SADC EPA States in the formulation and implementation of complementary policy measures aimed at safeguarding universal access.

The provision of development support aimed at enhancing negotiating capacity, improving national policy formulation, strengthening regulatory frameworks and institutional capacity, is a priority of participating SADC EPA States in this process. To this end, specific cooperation text in services and investment shall be concluded and shall subsequently form the platform for ongoing engagement.

The Right to Regulate

Participating SADC EPA States reserve the right to regulate economic and non-economic activities within their territories in order to achieve public policy objectives. Participating SADC EPA States also maintain that any service that is supplied in the exercise of governmental authority, i.e. supplied neither on a commercial basis nor in competition, will be excluded. Further, the EPA negotiations shall accommodate the necessary flexibilities to ensure special support to enable the development of small and medium-sized enterprises (SMEs).

Regulatory Adequacy

A fundamental necessity in any services liberalization process is that suitable regulatory and institutional frameworks should be in place. In the context of the EPA, the EC Party should provide the necessary assistance. Achieving satisfactory levels of regulatory adequacy is a guiding principle. The sequence and timing of progressive liberalization shall therefore take into account the progress being made in laying the necessary institutional and regulatory foundations.

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Source: SADC[30]

The extent to which the other EPA configurations share the above positions of the SADC EPA group is far from clear. There also has to be substantive alignment between the EC template and the SADC EPA negotiation principles on services for the later group to achieve the objectives of negotiating a services chapter, particularly in the background having earlier on resisted such negotiations. The above positions do not also deal with the implications of the non-participation of Angola, Namibia and South Africa in this process and they seem content with the SADC IEPA which simply states that these countries may join the negotiations when they wish to. The position that South Africa has adopted within the SADC EPA group has direct implications for what other SADC countries agree to in the rest of the EPA configurations. Hence the divergences are not only with respect to the SADC EPA group.

There is already no coherence on services liberalisation with respect to trade relations with the EU and there is no common SADC position on intra-SADC services liberalisation. This has negative implications on regional integration given the key role that services play in all the SADC economies and their direct link with critical infrastructure development such as roads, transport and communication. It is difficult to see how such key issues like infrastructure development which is a major supply-side constraint in the SADC region can take-off without the necessary common positions on trade in services.

4.4 Investment issues

Although all the IEPAs (except the Central Africa IEPA) cite investment as one of the areas for the on-going EPA negotiations only the SADC IEPA attempts to link this process with the SADC-wide regional agenda. Article 67.3 provides that the Parties agree to an investment chapter which takes into account

30. SADC EPA Framework for Services and Investment Negotiations, 12 September 2008, SADC/EPA-MIN/14/2008/4.

the relevant provisions of the SADC Protocol on Finance and Investment. The problems regarding this protocol have been discussed in this report and it is not apparent how article 67.3 would be applied in practice to enhance the PFI. In particular it has been noted that the PFI is problematic to implement on account of ill-defined legal obligations.

4.4.1 Nature of obligations on investment negotiations

It is important to consider the extent of obligations which the SADC countries agreed to with respect to negotiations on investment issues. The question is whether or not the IEPAs impose an obligation for SADC countries to negotiate investment rules in the context of the EPAs or to commit themselves to specific regulatory changes with regards to their investment laws for the purposes of the EPAs. The question has significance on issues regarding regional integration as new obligations couched under the EPAs can create new regulatory reforms with potential to compete with the process under the SADC PFI. It is therefore important to take note of what the IEPAs provide for and how this relates to the linkages between the Cotonou Agreement and the regional integration agenda on investment related issues.

Table 13: Investment provisions in the IEPAs

SADC IEPA	ESA IEPA	EAC IEPA	TDCA
Promote regional integration, economic cooperation and good governance thus establishing and implementing an effective, predictable and transparent regional regulatory framework for trade and investment between the Parties and among the SADC EPA States. (art.1(b)	Establishing and implementing an effective, predictable and transparent regulatory framework for trade and investment in the ESA region, thus supporting the conditions for increasing investment and private sector initiative and enhancing supply capacity, competitiveness and economic growth.(art. 1(f)	Establishing and implementing an effective, predictable and transparent regional regulatory framework for trade and investment in the EAC Partner States, thus supporting the conditions for increasing investment, and private sector initiative. (art.1(f)	Cooperation between the Parties shall aim to establish a climate which favours and promotes mutually beneficial investments, both domestic and foreign, especially through improved conditions for investment protection, investment promotion, and the exchange of information on investment opportunities. (art.52)

Source: SADC, EAC, ESA IEPAs and the TDCA.

The SADC, EAC and ESA IEPAs all speak of a regulatory framework for investments as one of the objectives of the EPAs. Both the SADC and EAC IEPAs refer to implementing "regional regulatory frameworks". It is not clear why for example, the ESA IEPA refers to the creation of regulatory (thus rule-making) frameworks for investment as part of its objectives but goes on to use the language of

cooperation which includes investment as part of the development chapter. The ESA IEPA is inconsistent in this regard.

The TDCA also envisages regulatory reform as part of its objectives and refers specifically to investment protection although the language is more of cooperation than actual obligations. Hence one of the objectives in the IEPAs (except for the Central Africa IEPA) is regulatory reform of the investment climate. It is not clear if the stated objectives of the SADC, EAC and ESA IEPAs on investment issues are in line with the actual interests of the SADC countries as well as the regional integration process. It is useful to analyse the background issues in order to assess the potential implication of pursuing the objectives in the IEPAs.

4.4.2 The ACP and AU approaches to investment in the EPAs[31]

The ACP adopted the "Guidelines for the Negotiations of EPAs" in July 2002.[32] The guidelines note that:

"The EPA negotiation process should aim at attracting FDI through resource allocation for investment promotion/facilitation, conclusion of investment protection and double taxation agreements, in addition to the creation of an enabling environment."

The guidelines link the conclusion of investment protection agreements with the EPA process. Whether the approach is in line with the real interests and obligations of the ACP states in the context of the Cotonou Agreement is discussed below. Indeed this position is at variance with that adopted by the African Union in the Nairobi Declaration on EPAs in 2006 which stated:

"On the issues of investment policy, competition policy and government procurement, we re-iterate the concerns we have raised at the World Trade Organisation, leading to their being removed from the Doha Work Programme. We reaffirm that these issues be kept outside the ambit of Economic Partnership Agreements. We stress the importance of maintaining consistency in our negotiating objectives and positions in the various fora. We appeal to regional groupings, that in dealing with these issues, they ensure the coherence of our negotiating objectives and positions adopted in various fora. We specify that regional instruments can be developed for the sole mutual benefit of member states of regional groupings."[33]

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31. For this section see too an earlier study E. Munyuki and R. Machemedze, Negotiating Investments in the Economic Partnership Agreements: Strategic considerations for Eastern and Southern African Countries, SEATINI, April 2010.
32. ACP (2002) (ACP/61/056/02). Also available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_130235.pdf
33. AU Ministers of Trade, Nairobi Declaration on EPAs, http://www.africa-union.org/root/au/AUC/Departments/TI/EPA/DOC/Nairobi%20Declaration%20on%20EPAs%2014%20April%202006.pdf

4.4.3 Investment issues in the Cotonou Agreement

The Cotonou Agreement serves as the basis of the current negotiations between the EU and the ACP regions. It is important to identify the investment related provisions in this agreement and assess the nature of the commitments which the parties made. Essentially this section discusses whether the ACP-EU countries agreed to negotiate investment related rules as part of the EPAs. The following questions are pertinent: Is there an obligation to negotiate investment issues? What is envisaged in the negotiations, investment protection rules or mere co-operation on investment promotion? When should these negotiations be conducted? It is also crucial to identify the potential impact of these options on the SADC regional integration process, particularly on investment reforms.

The language of co-operation as opposed to rule setting commitments on investment issues is found under article 34.3 of the Cotonou Agreement. The provision reads:

"To this end economic and trade cooperation shall aim at enhancing the production, supply and trading capacity of the ACP countries as well as their capacity to attract investment. It shall further aim at creating a new trading dynamic between the Parties, at strengthening the ACP countries trade and investment policies and at improving the ACP countries' capacity to handle all issues related to trade."

The above provision is very general, on its own it does not create an obligation to negotiate investment related issues. Whatever is meant by "strengthening the ACP countries trade and investment policies" only indicates that some sort of intervention in these areas is envisaged.

However articles 75 and 78 of the agreement deal more explicitly with the investment issues. The two provisions respectively deal with "investment promotion" and "investment protection". Article 75 provides that the ACP states, the EU and its Member states "shall take measures and actions which help to create and maintain a predictable and secure investment climate as well as enter into negotiations on agreements which will improve such climate."

This provision creates an obligation on the ACP and EU states to negotiate agreements on predictable and secure investment climates. The element of predictability would ordinarily include a set of clear rules and procedures governing investment between the ACP regions and the EU. The word "shall" in the context of article 75 creates a requirement for the parties to negotiate such rules and procedures for the purposes of investment promotion. However there are two crucial aspects to note about the implementation of this requirement to negotiate the agreements on investment:

(a) Article 75 does not stipulate when these negotiations should be conducted; and

(b) Article 75 does not link the negotiations for investment agreements to the current EPA negotiations.

These two observations are crucial to the sequencing of the negotiation for investment climate agreements. The Cotonou agreement is valid for 20 years, that is until 2020 given that it was signed in March 2000. The parties have until 2020 to negotiate the agreements. Quite clearly if the SADC countries or any of the ACP states are not ready to enter into these negotiations then they are at liberty to take advantage of the flexibility created by the non-stipulation of a deadline in the context of article 75. There is no immediate legal obligation to negotiate investment promotion agreements. It is up to the interests of the parties to determine when this can be done, and, clearly the EU has an interest in engaging the SADC countries in negotiations immediately. The same cannot be said of the SADC countries. Instead of getting pushed into premature negotiations the SADC countries should concentrate on other issues requiring immediate attention such as the EPA implementation and the development aspects of the EPA mechanism.

Further the SADC countries could also utilise this flexible timetable to assess the real implication of article 75 by focussing on;

- Their state of preparedness or otherwise to engage in these negotiations;
- Addressing shortcomings in their capacity to engage in these negotiations;
- Conducting appropriate investment agreements related needs assessments;
- Reviewing the current applications and effects of the existing bilateral investment treaties (BITs) which they have concluded with the individual EU countries to inform the positions to be adopted on the substance of the new investment agreements to be negotiated: and
- Strengthening regional investment regimes for the benefit of SADC members as recommended in the AU Nairobi Declaration on EPAs. The position taken by the SADC EPA states to link the PFI to the current negotiations is in line with this AU declaration and it can be used as an opportunity to fine tune the PFI to give it legal force and implementation schedules.

This approach has the advantage of decongesting the negotiation framework. It is self defeating for the SADC countries to merely engage in the negotiations simply because the EU is ready to do so. There is no requirement for these negotiations to be conducted within the EPAs timeframes.

However, a full analysis has to take the practical implications of article 78 ("investment protection") into account. It is necessary to quote article 78 in full, it reads:

> "1. The ACP States and the Community and its Member States, within the scope of their respective competencies, affirm the need to promote and protect either Party's investments on their respective territories, and in this context affirm the importance of concluding, in their mutual interest,

investment promotion and protection agreements which could also provide the basis for insurance and guarantee schemes.

2. In order to encourage European investment in development projects of special importance to, and promoted by the ACP States, the Community and the Member States, on the one hand and the ACP States on the other, may also conclude agreements relating to specific projects of mutual interest where the Community and European enterprises contribute towards their financing.

3. The Parties also agree to introduce within the economic partnership agreements, and while respecting the respective competencies of the Community and its Member States, general principles on protection and promotion of investments, which will endorse the best results agreed in the competent international fora or bilaterally."

It is important to analyse how this provision relates to the current negotiations for a comprehensive EPA between the EU and the SADC countries. The first question to note is whether article 78 requires the SADC states to negotiate investment protection agreements with the EU. The answer is no. Article 78.1. is a mere affirmation of the importance of concluding investment protection and promotion agreements between the EU and ACP states. It is not a requirement to negotiate investment protection and promotion agreements. The later is required under article 75 whose implications we have already discussed. Article 78.2. is also not a requirement to negotiate these matters, but it gives the parties the right to decide whether or not they wish to conclude agreements relating to specific projects involving EU funds.

The second question is on the linkages of the investment protection and promotion negotiations with the EPAs. Article 78.3. provides that the parties agreed to introduce within the EPAs general principles on protection and promotion of investments. This is the clearest attempt at linking the EPAs with the investment related negotiations. But the provision is far from requiring the negotiation of comprehensive substantive and procedural rules to govern investments between the EU and the SADC countries. It merely talks of introducing "general principles". There is a contradiction between article 75(b) and article 78.3. A reading of the earlier provision would imply the negotiation of some sort of rules to govern investment promotion, but a reading of the later merely restricts the issue to general principles. A way of getting round this contradiction would be to recognise that article 75 does not in any way require the negotiations to take place in the EPAs context, in other this is a separate process, with a separate timetable guided only by the duration of the Cotonou Agreement. And article 78.3. addresses the issue in the context of the EPAs as a stage to introduce the issue in the form of "general principles". The last point is critical to the positions of the SADC countries, it gives them the right to avoid making a commitment to negotiate comprehensive and substantive rules on investment protection and promotion within the EPA context. The strategy would then be to commit to negotiating "general principles" not detailed commitments that have implementation obligations and which can trigger the dispute settlement mechanism when infringed.

The ACP negotiating guidelines discussed above are not helpful in this context since they contradict the AU position. The objectives set out in the SADC, EAC and ESA IEPAs are also capable of stifling the proposed regional initiatives under the SADC Protocol on Finance and Investment as they propose another "regional regulatory framework". The strategy of excluding investment protection issues in the EPAs context can also leave the SADC countries to pursue their own regional integration agenda in the light of an improved investment protocol that has clear implementation schedules.

4.5 Competition policy, government procurement and intellectual property rights

Both the ESA and EAC IEPAs identify competition policy as an area for the second stage of the negotiations without adding much detail on the substance of the negotiations. However the proposed ESA-EU text casts competition policy negotiations as mainly aimed at building national and regional capacity to enforce competition policy and laws, hence the suggested context is developmental rather than rule-making. The SADC IEPA commits the EC to agreeing to strengthen regional capacity in the areas of competition and government procurement and stipulates that negotiations on these two areas will only be envisaged once adequate regional capacity has been built. On the other hand, the Central Africa IEPA makes reference to the effective implementation of competition rules and polices and of regional policies in Central Africa which govern the anti-competitive practices (article 57). This implementation of competition rules is envisaged to take place in two stages, first applying the rules in the context of regional integration in Central Africa and, after a transition period to be determined jointly, applying the rules bilaterally. Articles 58 and 59 of the Central Africa IEPA treat intellectual property rights and public procurement in the same manner. In this case there is scope for the DRC as a member of the Central Africa EPA configuration to adopt more stringent requirements on IPRs and public procurement than the rest of the SADC region as far as trade relations with the EU are concerned. This point excludes South Africa which under article 46 of the TDCA agreed to undertake, where appropriate, TRIPS-plus obligations.

Although also adopting the question of building regional capacity first, the Central Africa IEPA is explicit that at some point competition rules will be applied bilaterally with the EC, and similarly for rules on intellectual property and public procurement.

The IEPAs create variations with respect to the substance and application of competition laws and policies in the SADC region, and this puts South Africa on the other extreme having agreed to implement competition laws and policies in the context of articles 35-36 of the TDCA. The possibility of a wider regional dissonance on competition policy may be caused by the adoption of a transition period under the Central Africa EPA, if for example, the DRC signs up to a full EPA with a requirement for implementing bilateral rules on competition with the EC. Potential problems will be compounded by the fact that

some SADC countries also belong to COMESA which has adopted a regional competition policy and institutions which may not necessarily be similar in substance with a SADC region competition regime.

To date the SADC region has no common competition policies as some SADC countries have competition laws and authorities whilst others do not have them, for example Botswana only recently adopted but has not yet implemented competition legislation. The current variations may be utilised to develop and implement competition policy at a regional level by giving impetus to the PFI which lacks timeframes for the adoption and implementation of competition policies. The absence of clear commitments on competition policy amongst the bulk of the SADC countries as far as the EPAs are concerned should be used to move the regional position on this issue.

Whilst all the IEPAs identify trade-related issues as part of the second stage of the EPA negotiations there are differences within the negotiating configurations and amongst the configurations. The differences have caused a split in the SADC EPA group, leaving Angola, Namibia and South Africa out of the negotiations, and creating incoherence on the SADC EPA group's position on the issues. In addition the DRC is also not participating in negotiations on these issues as the Central Africa IEPA is yet to include all the members of the configuration apart from Cameroon which is the only signatory to date, and which has not even started to implement the IEPA.

4.6 Conclusion

The main objective of this study is to identify the impact of the EPAs process on the SADC regional integration project and to identify the potential strategies to be adopted to ensure that the regional integration process is enhanced rather than detracted by the EPAs process. The study has identified several inconsistencies in the positions adopted by the SADC countries in their negotiations with the EC for a new trading arrangement to replace the historical one-way trade preferences. The SADC states have not engaged the EU on the basis of common positions which are premised on the gains and promises of the SADC regional integration process. However the study also noted that even before the EPAs process began there were inherent problems with the SADC integration process owing to ill-defined obligations in the economic integration instruments, poor implementation of stated obligations, and in some instances like the free movement of people within SADC, absence of real will to ensure that the regional instruments designed to achieve the purpose are respected through signature, ratification and implementation. The EPA process has served to compound these problems by creating new subgroups in the SADC region and these subgroups also have contradictions on substantive issues which worsen and create new tensions in the integration process. Although this study has identified a number of technical areas for intervention, a lot depends on the exercise of decisions at a political level in order to give effect to the regional integration process.

V. Recommendations and Strategies for SADC States

5.1 Securing political commitments on the SADC FTA

The current EPA process has left the SADC regional integration project in a precarious position and political decisions need to be made to deal with this situation. The tensions brought upon the regional integration process by the EPA negotiations may however serve as an opportunity for the SADC bloc to seriously consider the viability of the regional economic integration agenda. There are implementation problems under the SADC integration process which are not necessarily a result of the EPA negotiations, and as such, these should be isolated, as has been attempted above, and addressed comprehensively by the SADC leadership if the original regional integration process is to succeed. If the common market agenda is to be achieved there is firstly a need for the entire SADC membership to subscribe to the SADC FTA. This includes the firm commitments of the political leadership in Angola, the DRC and Seychelles. An all-SADC commitment on the FTA is necessary as a first step before dealing with the technical issues of implementation of the FTA's requirements in order to achieve the regional economic integration milestones.

The process of consolidating the SADC FTA for an eventual Customs Union must also be complemented by the resolution of outstanding incoherencies caused by multiple memberships of SADC countries to competing regional economic integration processes. If the SADC common agenda is to survive the political leadership should take definitive decisions to resolve the incoherencies as a matter of urgency.

This political aspect must remain relevant to any recommendations that emerge from this study. For example there can be as many technical studies as possible on the viability or none of the current multiple REC membership that afflicts SADC countries but ultimately one political decision or another will have to be made which may be out of the context of the studies. On this point the SADC political leadership needs to make decisions on whether or not to all the aspects of the regional integration project which include economic, social, cultural and political aspects, should be pursued, or certain aspects of this project should be modified or abandoned.

5.2 Resolving technical and institutional implementation problems in the regional integration process

The most immediate problem is for the SADC membership to resolve the implementation difficulties around the SADC regional integration process. The study identified a number of issues around the trade policy instruments adopted at regional level where no movement has been forthcoming in terms of implementation for the enhancement or achievement of stated regional goals.

The economic instruments addressing the regional integration process require strengthening in order to produce clear timeframes and substantive milestones for implementation. In this case work is required on aligning the SADC Protocols on Trade, Finance and Investment, and on the Facilitation of the Movement of Persons. This alignment must also deal with ambivalent attitudes with respect to tackling NTBs, absence of regional progress on trade in services, and in particular, the substantive aspects relating to the movement of natural persons and the right of establishment within the SADC group. Relying on the RISDP to give impetus to ill-defined obligations in the existing regional instruments will not assist in this process as the RISDP carries no actual force on its own. Creating clear implementation modalities and strengthening the regional economic instruments should result in the adoption of common positions with respect to trade policy in the SADC region.

The SADC countries are stretched with respect to the availability of human and financial resources to conduct the multiple roles required to effectively deal with various trade and development issues. Addressing the above implementation issues entails negotiating some level of flexibility with the EC party so that attention may be drawn to the need for the resolution of internal (SADC) difficulties.

The second strategy is to create effective procedures to ensure that member states report on their implementation obligations under the SADC Protocol on Trade in order to consolidate the FTA. This requires clear procedures for effective monitoring of, for example, the timely availability of tariff liberalisation schedules and the effective monitoring of the implementation of such commitments.

Third, it is important to increase the national and regional institutional capacities to implement and enforce the regional economic integration instruments and programmes.

5.2.1 Reviewing regional integration in the context of the EPAs

The second stage towards enhancing regional integration should involve a SADC wide review of the regional integration process in the context of the EPAs, in particular in the light of the substance and speed of the second stage of the negotiations. The deadlines set for the achievement of agreements in the second stage of the negotiations have already been missed, and in some regions notably the Central Africa EPA group, they have not even started. There is no harm is SADC states deliberately delaying this process for the purpose of aligning the regional positions, which are yet to be developed, with the aims of the second stage of the negotiations, especially on the divisive new generation issues. The claims of the Cotonou Agreement and the EPAs are that both processes aim at enhancing regional integration, engaging in a review process justified on this basis should not meet political resistance from the EC if these claims are held sincerely. The suggestion also requires the support of the other negotiating configurations, in particular the ESA and EAC groups who should be persuaded to engage in this review on the basis of the AU's position on the EPAs and the new generation issues. This recommendation also has the potential of creating a resolution on the rift in the SADC EPA group.

The review period can also be utilised by the SADC countries to focus on strategies on the new generation issues and deal with-

- Their state of preparedness or otherwise to engage in these negotiations;
- Addressing shortcomings in their capacity to engage in these negotiations;
- Proposing and adopting substantive provisions on regional integration in trade in services;
- Conducting appropriate investment agreements related needs assessments;
- Reviewing the current applications and effects of the existing bilateral investment treaties (BITs) which they have concluded with the individual EU countries to inform the positions to be adopted on the substance of the new investment agreements to be negotiated: and
- Strengthening regional investment regimes for the benefit of SADC members as recommended in the AU Nairobi Declaration on EPAs. The position taken by the SADC EPA states to link the PFI to the current negotiations is in line with this AU declaration and it can be used as an opportunity to fine tune the PFI to give it legal force and implementation schedules.

This process should also enhance the actual role played by the RECs under the EPAs process and give them substantive roles to play in delivering the regional integration aspect of the EPA negotiations. At the moment the national positions drive the process and marginalise the RECs themselves when the later are at the core of the implementation and monitoring of the regional integration agenda.

5.3 Resolving issues arising from the trade in the goods aspect of the EPAs

The following issues are pertinent in order to gain some level of regional coherence in the EPA process-

- Rationalising the liberalisation commitments made with respect to trade in goods, in particular taking account of the potential effects of the differences in the liberalisation schedules under the ESA and SADC EPAs for the purpose of creating common SADC positions in line with the SADC Protocol on Trade with respect to the need for coherence and co-ordination of negotiating positions.
- Re-examining the MFN clauses to eliminate incoherencies with respect to obligations of SADC countries in FTAs with Parties other than the EU in order to create flexibility for future trade negotiations and agreements with economies such as Brazil, India, China and other "major economies."

- Establishing certainty on the dispute settlement mechanism on trade defense instruments, in particular, anti-dumping and countervailing measures.
- Creating convergence on the application periods for safeguard measures in order to take account of the positions of Tanzania and the DRC, and to align this process with the aims of the RISDP with respect to the policies necessary to achieve industrial development and diversification. Further it is necessary to align this process with the treatment of safeguard measures under the TDCA, in particular article 25 thereof which has an effect on the proposed infant industry protection clauses suggested by, for example, the SADC EPA group.
- Resolving differences on the treatment of quantitative restrictions, in particular, the fact that the Central Africa IEPA may result in the DRC adopting positions which are different from the SADC Protocol.
- Harmonising positions on the use of fiscal policies for industrial development regimes, for example, through the implementation of article 18 of the PFI as a strategy of creating common positions in the context of the EPAs.
- Taking measures to create regional coherence in the SADC approach on subsidies to avoid undermining article 19.1 of the SADC Protocol on Trade.
- On customs and trade facilitation it is important to give precedence to the regional agenda on customs and trade facilitation reforms, further due to the punitive EPA regime on non-cooperation in administrative matters, it is important for the rest of the SADC states to follow the TDCA or the SADC EPA route in order to achieve regional coherence.
- The SADC countries under the EAC IEPA and the ESA IEPA should consider the cohesive effect of adopting the procedure under the TDCA and the SADC IEPA with respect to TBTs and SPS measures.
- To avoid regional discrepancies on the development aspect of the EPAs it is essential that some level of cohesion should be developed on the actual deliverables expected from the EC in support of the development chapter of the EPAs.

The above recommendations require the appropriate recognition of the role played by the original economic integration institutions in the SADC region.

The SADC States should take the EPAs process as an opportunity to correct the tensions within the SADC regional integration agenda. This means resolving those tensions that existed before the EPA process started and dealing with issues arising out of the EPA negotiations to deepen the regional integration process. This is an urgent process that requires significant political commitment as it involves, in some member states, making decisions on whether or not to proceed with competing regional integration processes where these members belong to another REC, and where there is no consistency with the SADC agenda.